Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN F. CANNON
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

ROBIN D. FESSEL
SULLIVAN & CROMWELL
New York, New York

FRANCIS X. DEE
DAVID J. REILLY
CARPENTER, BENNETT & MORRISSEY
Newark, New Jersey
Of Counsel

April 13, 1995

QUESTION PRESENTED

This Court has held that in employment discrimination cases the burden of establishing a prima facie case of disparate treatment under the *McDonnell Douglas* evidentiary framework is not onerous, but that satisfaction of that burden only shifts to the defendant the burden to rebut the presumption of discrimination by producing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action, and that if the defendant has done everything that *McDonnell Douglas* would require of it in that regard, whether the plaintiff really did properly make out a prima facie case is no longer relevant. The question presented is:

> Whether the court of appeals erred in holding that a motion for summary judgment dismissing an age-discrimination claim must always be denied, regardless of the amount and quality of the evidence in the record as a whole bearing upon the nondiscriminatory character of the defendant's motivation, if the record contains (1) evidence which, if considered in isolation, is sufficient to establish a prima facie case under *McDonnell Douglas*, and (2) evidence that the defendant's nondiscriminatory reason, as characterized by the court, is "not worthy of credence" or "implausible."

PARTIES INVOLVED

Petitioner, Johnson & Higgins, is a global insurance brokerage and employee-benefits consulting firm. The firm is incorporated under New Jersey law and has its principal place of business in New York City. At all relevant times, all of the stock of Johnson & Higgins was owned by the members of its Board of Directors, who were also senior officers of the firm and its subsidiaries. (*See* Court Rule 29.1.)

Respondent, Burt N. Sempier, is a former Director of Johnson & Higgins.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES INVOLVED ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. Statement of Facts 4

B. The Proceedings Below 7

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 22

APPENDIX

A. Opinion of the Court of Appeals for the First Circuit Reversing the District Court's Grant of Summary Judgment 1a

B. Order of the Court of Appeals Denying Petition for Rehearing 30a

C. Memorandum and Order of the United States District Court for the District of New Jersey Granting Summary Judgment 32a

D. Memorandum and Order of the District Court Initially Denying Summary Judgment 48a

E. Order of the District Court Denying Motion for Reconsideration of Initial Denial of Summary Judgment 56a

F. Federal Rules of Civil Procedure Rules 50(a) and 56(b), (c) and (e) 58a

G. Age Discrimination in Employment Act §§ 623(a)(1) and 626(d)(2) 60a

TABLE OF AUTHORITIES

Cases:	Page
Alires v. *Amoco Product Co.*, 774 F.2d 409 (10th Cir. 1985)	17
Allen v. *Montgomery County, Ala.*, 788 F.2d 1485 (11th Cir. 1986)	17
Anderson v. *Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)	16
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	2, 13
Bluebeard's Castle Hotel v. *Virgin Islands Department of Labor*, 786 F.2d 168 (3d Cir. 1986)	17
Chipollini v. *Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.), cert. dism'd, 483 U.S. 1052 (1987)	8
Fuentes v. *Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)	11
Gaworski v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994)	16
Goodwin v. *St. Louis County Circuit Court*, 729 F.2d 541 (8th Cir. 1984), cert. denied, 469 U.S. 1216 (1985)	17

Griffin v. *City of Omaha*,
785 F.2d 620, *reh'g. en banc denied*,
40 E.P.D. ¶ 36,151 (8th Cir. 1986) 17

Hairston v. *Gainesville Sun Publishing Co.*,
9 F.3d 913 (11th Cir. 1993) 16

Hazen Paper Co. v. *Biggins*,
___ U.S. ___, 113 S. Ct. 1701 (1993) 16, 17, 21

Hedberg v. *Indiana Bell Telephone Co.*, No. IP
93-1344-C, 1994 WL 228184, *6-*7 (S.D. Ind.
Mar. 14, 1994) 18

Holmes v. *Bevilacqua*,
794 F.2d 142 (4th Cir. 1986) 17

Humphreys v. *Bellaire Corp.*,
966 F.2d 1037 (6th Cir. 1992) 17

Ingels v. *Thiokol Corp.*, 42 F.3d 616 (10th
Cir. 1994) 16

Manzer v. *Diamond Shamrock Chemicals Co.*, 29
F.3d 1078, 1083 (6th Cir. 1994) 16

McDonnell Douglas Corp. v. *Green*,
411 U.S. 792 (1973) . . . . . *passim*

Mitchell v. *Data General Corp.*, 12 F.3d 1310,
1316 (4th Cir. 1993) 16

Namenwirth v. *University of Wis. Board of Regents*
769 F.2d 1235 (7th Cir. 1985), cert. denied,
474 U.S. 1061 (1986) 17

Palucki v. *Sears, Roebuck & Co.*,
879 F.2d 1568 (7th Cir. 1989) 16

Rand v. *CF Industries, Inc.*, 42 F.3d 1139,
1146-47 (7th Cir. 1994) 16

Rhodes v. *Guiberson Oil Tools*,
39 F.3d 537 (5th Cir. 1994) 15

Robinson v. *12 Lofts Realty, Inc.*,
610 F.2d 1032 (2d Cir. 1979) 17

Saulpaugh v. *Monroe Community Hospital*,
4 F.3d 134 (2d Cir. 1993) 15

St. Mary's Honor Center v. *Hicks*,
___ U.S. ___, 113 S. Ct. 2742 (1993) . . . . . *passim*

Texas Department of Community Affairs v.
Burdine, 450 U.S. 248 (1981) 12, 18

U.S. Postal Service Board of Govs. v. *Aikens*,
460 U.S. 711 (1983), and (iii) 2, 10, 12, 13

United Air Lines, Inc. v. *Evans*,
431 U.S. 553 (1977) 10

Washington v. *Garrett*, 10 F.3d 1421,
1433 (9th Cir. 1993) 16

West v. *Russell Corp.*,
868 F. Supp. 313 (M.D. Ala. 1994) 18

Woods v. *Friction Materials, Inc.*,
30 F.3d 255 (1st Cir. 1994) 15

Statutes:

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 8

42 U.S.C. §§ 1981 17

Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. 3, 7, 8

Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 et seq. 18

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 17

Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. . 17

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. et seq. 17

Legislative Materials:

Statement of Aletha L. Brown Before U.S. House Committee on Appropriations, Subcommittee on Commerce, Justice, State and Judiciary, March 1, 1995 18

Rules:

Fed. R. Civ. P. 56 3

Treatises and Other:

9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2524, at 249-51 (2d ed. 1994) 14

The Administrative Office of the United States Courts, *Statistical Tables*, Tables C-2 (1992-94) 18

EEOC, Combined Ann. Reps. 1991 & 1992 at 29 18

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BURT N. SEMPIER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which reversed the summary judgment of the United States District Court for the District of New Jersey in favor of Petitioner.

Review by this Court is warranted because the court of appeals' decision is contrary to decisions of this Court,[1] is in conflict with decisions from other circuits, and involves an important question of law.

OPINIONS AND ORDERS BELOW

The January 6, 1995 opinion of the court of appeals is reported at 45 F.3d 724 and reproduced in the Appendix at 1a-28a.[2] The court of appeals' February 14, 1995 order denying rehearing and rehearing *in banc* is unreported and is reproduced at 30a-31a. The March 10, 1994 memorandum and order of the district court granting summary judgment for petitioner is unreported and is reproduced at 32a-47a. The district court's memorandum and order of August 4, 1993, and its order of October 8, 1993, denying, respectively, petitioner's initial motion for summary judgment and its

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[1] The cases are (i) *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2748-49 (1993) (when defendant has produced "evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action . . . the *McDonnell Douglas* framework -- with its presumptions and burdens -- is no longer relevant" (emphasis in original)), (ii) *U.S. Postal Service Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 715 (1983) ("[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case [under *McDonnell Douglas*], whether the plaintiff really did so is no longer relevant"), and (iii) *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986) (in discrimination cases (absent the *McDonnell Douglas* presumption) as in any other case, "the inquiry under [Rules 56(c) and 50(a) of the Federal Rules of Civil Procedure] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

[2] The Appendix to this Petition is cited "___a," and the Joint Appendix in the court of appeals is cited "JA___."

motion for reconsideration, are also unreported and are reproduced at 48a-55a and 56a-57a.

JURISDICTION

The decision of the court of appeals was entered on January 6, 1995. A timely petition for rehearing by petitioner was denied on February 14, 1995, and this petition is being filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the application of Fed. R. Civ. P. 56 in the context of a claim under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.* The relevant sections of Rule 56 and the principal sections of the ADEA involved in this case, §§ 623(a)(1) and 626(d)(2), are reproduced at 58a-60a.

STATEMENT OF THE CASE

A. Statement Of Facts

Between June 7 and 11, 1991, the 36 other Directors of Petitioner, Johnson & Higgins ("J&H"), were polled and voted unanimously to accept the letter of "resignation as a Director, officer and employee" of J&H that, upon becoming a Director, Respondent, Burt N. Sempier, like every other J&H Director, had tendered to the Board to become effective upon acceptance by two-thirds of its members (JA368, 389, 413-14; 5a). Once he left the Board, Mr. Sempier became obligated under J&H's corporate charter to sell his J&H stock back to the firm for an agreed consideration (JA366-67). J&H "operates as if it were a partnership" (3a, n.2) and Mr. Sempier was one of the partners.

Mr. Sempier joined J&H as its Comptroller in 1968, and was its Chief Financial Officer ("CFO") and the head of its Finance Department by the time he was elected to the Board in April 1986. He became a Director basically because of the sponsorship of the then Chairman and Chief Executive Officer ("CEO"), Robert V. Hatcher, Jr. A number of Directors had reservations about Mr. Sempier's suitability (JA364-65), including the member of the Board's Executive Committee to whom Mr. Sempier reported, E. Eric Johnson (JA727-30), but they all ultimately deferred to their Chairman's wishes (JA365, 843-44). (3a-4a.)

In May 1987, however, in deference to Mr. Johnson and others, Mr. Hatcher replaced Mr. Sempier as CFO with someone who had been hired from the outside. At the same time, Mr. Hatcher named Mr. Sempier to the newly created position of Chief Administrative Officer ("CAO") to which the Management Information Systems ("MIS"), Human Resources, Professional Development, and Real Estate and Facilities Departments were directed to report. In that capacity, Mr. Sempier began reporting

to Kenneth A. Hecken, the Vice Chairman of the Board. Mr. Johnson (JA732-33) and Mr. Hecken (JA778-79) both had reservations regarding Mr. Sempier's ability effectively to lead the operations that reported to him as CAO. (4a-5a.)

Consistently with his contention that his Board colleagues had never "advised him that his performance was less than satisfactory" or brought "to his attention any deficiencies in his performance of his functions" (3a), Mr. Sempier describes his replacement as CFO as a "planned action" and says he considered his appointment as CAO a promotion (JA321).

In December 1989, after an approximately 18-month search, J&H elevated Alan G. Page to the newly created post of Chief Information Officer ("CIO"). Mr. Page had been the Manager of J&H's Risk Management Services Department. As the new CIO, Mr. Page assumed the responsibility for MIS that Mr. Sempier had had theretofore. (JA371-72, 779-82.) In his sworn representations to the district court on the summary-judgment motions Mr. Sempier said that the "reorganization of the MIS function was also a planned move," based upon MIS's "incredible growth over the years," and that he "supported the initiative and [although not in charge of that process] was also actively involved in the search for candidates for the Chief Information Officer who would head up that stand-alone department" (JA321-22). About a year before Mr. Page filled the post (JA371-72, 781), Mr. Hatcher was unsuccessful in "lobbying" his colleagues to consider Mr. Sempier for the CIO position (4a). But for his part, and again consistently with his claim "that he never received any unfavorable criticism that his performance was poor or inadequate" (16a), Mr. Sempier has sworn that he "was never a candidate for that position" (JA 322); never having been a candidate, he could not have been turned down for lack of qualifications, either absolutely or

relatively to Mr. Page, or for any other reason. (See below, pages 9-10.)

MIS had been by far the most significant of the functions that reported to Mr. Sempier as CAO, and as Mr. Hecken stated in his affidavit in support of J&H's second motion for summary judgment,

> . . . once Mr. Sempier lost the MIS responsibilities to Mr. Page, there was no longer a colorable justification for Mr. Sempier continuing as a Director of J&H. Thomas E. Carpenter was hired in March 1990 with the understanding on the part of senior management, that is, Messrs. Hatcher, [David A.] Olsen, Nielsen, Meyer and me, that he would take over Mr. Sempier's remaining duties. Initially, Mr. Carpenter took over responsibility for personnel and training and development, leaving Mr. Sempier with responsibility only for real estate and facilities. (JA782)

The reason Mr. Sempier could no longer remain a Director was simple and was articulated by Mr. Hatcher in his affidavit in support of J&H's initial summary-judgment motion (JA372-73):

> The prestige and influence associated with a Directorship at J&H, and the credibility of J&H's policy that Board seats are filled, and held, on a meritocratic basis, would be seriously compromised if Directors who were obviously making no significant contribution to the firm were allowed to occupy Board seats.

Mr. Hatcher, who was himself scheduled to retire at the end of 1990, met with Mr. Sempier on April 19, 1990. He advised him that Mr. Carpenter had been hired and, "using strong and unequivocal language, that Sempier had no choice

but to retire or be forced out" (5a, 18a, n.6). Mr. Hatcher also told Mr. Sempier that to mitigate the financial impact of his early retirement, J&H would provide him with enhancements to his existing retirement package. Written offers of improved retirement benefits were made to Mr. Sempier in September and December 1990, but Mr. Sempier had not agreed to retire by the time Mr. Hatcher retired. Thus, it fell to the new Chairman and CEO, Mr. Olsen, to achieve closure with Mr. Sempier. (JA373-77, 400-07.)

On January 4, 1991, Mr. Olsen wrote a memorandum to Mr. Sempier responding to his note to Mr. Hatcher dated December 28, 1990. Mr. Olsen said he was willing to further extend Mr. Sempier's "official" retirement date to September 30, 1991, but that all of his remaining duties (and the CAO title) would be assigned to Mr. Carpenter as soon as possible, and that there would in no event be any need for him to be in the office past March 29, 1991 (JA408).

Mr. Sempier did not leave at the end of March. Negotiations with regard to Mr. Sempier's retirement package continued into May. At the end of May, a final offer was made to Mr. Sempier and he was given until June 7 to accept it. Mr. Sempier did not accept it. By June 11, 1991, the Directors had voted unanimously to accept Mr. Sempier's previously tendered resignation. (JA410-14; 5a.)

B. The Proceedings Below

On December 12, 1991, Mr. Sempier filed an age-discrimination charge against J&H with the Equal Employment Opportunity Commission (JA490-95). By virtue of the 300-day statute of limitations on the filing of such charges, the filing was timely as to alleged violations of the ADEA that occurred after February 15, 1991 (29 U.S.C. § 626(d)(2); 60a). The Commission notified Mr. Sempier on April 7, 1992 that it had terminated its investigation of his

charge (JA496). Mr. Sempier's six-count complaint against J&H was filed in the district court on April 16, 1992.[3] The first count under the ADEA alleged that "[o]n June 11, 1991, plaintiff's employment was involuntarily terminated by defendant on account of plaintiff's age and in retaliation [for] plaintiff's refusal to 'voluntarily' accept defendant's early retirement proposals." The other five counts alleged state statutory and common-law claims. (JA378-88.)

The district court denied J&H's initial motion for summary judgment on August 4, 1993 (48a-55a), and its motion for reconsideration on October 8, 1993 (56a-57a). However, on March 10, 1994, it granted J&H's second motion for summary judgment. The ADEA and state-law age-discrimination claims were dismissed with prejudice; Mr. Sempier's other three claims were dismissed without prejudice for want of an independent jurisdictional basis. (32a-47a.)

The court of appeals reversed. It first considered whether Mr. Sempier had enough evidence to make out a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and concluded that he had:

> (a) The district court had held that Mr. Sempier's evidence failed to satisfy the "qualifications" prong of a prima facie case under the *McDonnell Douglas* evidentiary framework as articulated by the court of appeals in the age-discrimination context in *Chipollini* v. *Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.) (in banc), *cert. dism'd*, 483 U.S. 1052 (1987) (36a-37a). But the court of appeals found Mr. Sempier's "record of his twenty years of employment as an executive" to be sufficient evidence "that he was

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[3] The district court had jurisdiction pursuant to 29 U.S.C. § 626(c) and 28 U.S.C. § 1331.

qualified for the position from which he was discharged" (11a).

(b) The district court had also expressed doubt that Mr. Sempier had met his burden under the *Chipollini* prong that required him to show that "he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination" (34a), inasmuch as Mr. Carpenter, at age 54 when hired, was only four years Mr. Sempier's junior, and the senior Directors responsible for Mr. Sempier's termination ranged in age from 52 to 59 (38a-39a). But the court of appeals disagreed, holding that the age difference of over ten years between Mr. Sempier and Mr. Page (above, pages 5-6) should also have been considered: "The combined differences in age between Sempier on the one hand and Page and Carpenter on the other is clearly sufficient to satisfy the fourth [*Chipollini*] prong of a prima facie case by raising an inference of age discrimination" (12a; footnote omitted).

The court of appeals asserted that Mr. Page's age was probative of an age-based motive for the Board's acceptance of Mr. Sempier's resignation in June 1991 in spite of (and without addressing) (i) Mr. Sempier's sworn statement that he had never been a candidate for the CIO position to which Mr. Page had been promoted in December 1989, (ii) the fact that Mr. Hatcher's unsuccessful "lobbying" on Mr. Sempier's behalf had occurred about a year before Mr. Page emerged as the successful candidate (JA371-72, 781-82), (iii) the absence of any evidence as to Mr. Sempier's qualifications for the CIO post relative to Mr. Page's, other than statements in Mr. Hecken's affidavit to the effect that Mr. Page was qualified and Mr. Sempier was not (JA779, 781-82), (iv) the absence of any allegation by Mr. Sempier that age was a factor in Mr. Page's promotion, and (v) the fact that the district court plainly understood that on the record before it (*e.g.*, the charge (at JA 495) and the

complaint (at JA 11)) Mr. Sempier's contention was that he had been replaced by Mr. Carpenter (53a; 38a).

The court of appeals further found, as the district court had, that J&H met its burden under *McDonnell Douglas* of producing evidence of its nondiscriminatory reason for accepting Mr. Sempier's resignation (13a-14a).[4] It characterized that evidence, however, as follows:

> Here, J&H has presented two reasons. First J&H states that it terminated Sempier because his duties no longer justified retaining him in his position. Second, it contends that Sempier performed those duties poorly. (13a)

The first reason fairly reflected J&H's position, but the second did not. J&H's contention -- based upon what the district court correctly found was the "undisputed evidence regarding its policy on directorships" (42a) -- was that Mr. Sempier's resignation was accepted in June 1991 because even good performance of the limited duties he had -- more accurately, was squatting on -- could not justify his remaining a Director, in essence a partner, of the firm.

The court of appeals then proceeded to expand (implicitly) the poor-performance issue it had posited to include Mr. Sempier's performance from 1986 on (13a-14a). The effect was to extend the *McDonnell Douglas* framework to require that J&H have adduced evidence articulating nondiscriminatory reasons for actions that had not been made the subject of a timely age-discrimination charge, *see United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977), and

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[4] Under this Court's decision in *Aikens* (see n.1, above, page 2), this finding by the court of appeals renders irrelevant the legal errors that J&H believes the court committed in finding that Mr. Sempier had evidence sufficient to establish a prima facie case under *McDonnell Douglas*.

thereby to give Mr. Sempier more to shoot at on the so-called "pretext" phase of the *McDonnell Douglas* framework.[5]

Finally, the court of appeals found that Mr. Sempier had produced sufficient evidence to allow a jury to find that J&H did not terminate him for poor performance. (15a-18a; see below, n.6 at page 19.) Under the court of appeals' analysis, the existence of that issue, together with its finding that Mr. Sempier had made out a prima facie case (above, pages 8-9), mandated denial of J&H's motion:

> [T]o defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.

(9a; citing the court of appeals' earlier holding to the same effect in *Fuentes* v. *Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). In a "recap" of its analysis the court of appeals held that under this Court's decision in *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), even though J&H's evidence had dispelled the presumption of discrimination arising from Mr. Sempier's alleged prima

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[5] Because the court of appeals held that J&H had articulated a nondiscriminatory reason under *McDonnell Douglas* for accepting Mr. Sempier's resignation, the legal errors involved in its further analysis of that reason, though fairly raised (Court Rule 14.1.(a)), do not have to be addressed in order to consider the question presented by J&H's Petition. Moreover, if the question presented is answered in the affirmative as J&H will urge it should be, J&H will further argue that the classification of any relevant evidence in terms of the *McDonnell Douglas* framework is irrelevant under the legal standard the court of appeals ***should*** have applied in reviewing the district court's grant of summary judgment to J&H.

facie case, there remained the "permissible inference of discrimination" associated with the prima facie case which, in the presence of a genuine issue as to whether or not Mr. Sempier's performance warranted acceptance of his resignation, entitled Mr. Sempier to a jury trial of his ADEA claim. (18a-19a.)

REASONS FOR GRANTING THE WRIT

The court of appeals held that where an employee makes out a prima facie case under *McDonnell Douglas* and the mandatory presumption of discrimination it entails is dispelled by the employer's proffer of a nondiscriminatory reason, "the permissible inference of discrimination created by the prima facie case" remains, and if there is evidence discrediting the employer's proffered reason, a jury may always find against the employer.

That decision is contrary to decisions of this Court, is in conflict with decisions of other courts of appeals, and raises an issue of public importance.

I.

In *U.S. Postal Service Bd. of Govs.* v. *Aikens*, 460 U.S. 711 (1983), this Court held that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, *whether plaintiff really did so is no longer relevant*" (*id.*, at 715; emphasis added). The prima-facie-case analysis was held pointless in *Aikens* because the *McDonnell Douglas* framework had served its only purpose of putting before the district court "all the evidence it need[ed] to decide whether 'the defendant intentionally discriminated against the plaintiff'" (*id.* at 715; citing and quoting from *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)). In deciding the

"ultimate question of discrimination *vel non*," this Court said that the district court "should consider all the evidence, giving it whatever weight and credence it deserves" (460 U.S. at 714 n.3).

The court of appeals' decision is thus also contrary to this Court's decision in *Hicks*, the very case it purports to apply. *Hicks* holds that, once the employer has articulated nondiscriminatory reasons for its conduct, "the *McDonnell Douglas* framework -- with its presumptions and burdens -- is no longer relevant" (113 S.Ct. at 2749), and requires that the sufficiency of plaintiff's evidence be judged by the usual standard: whether on all the evidence the trier of fact could rationally conclude by a preponderance of the evidence that defendant had intentionally discriminated against the plaintiff. The standard applied by the court of appeals, which holds that a court cannot grant a defendant's summary judgment motion if the plaintiff has established a *McDonnell Douglas* prima facie case and has put forth evidence that the employer's explanation is not true, is incompatible with the Court's reasoning in *Hicks*. It is, in particular, directly contrary to the following statement (made in a context in which it is assumed that plaintiff has made out a prima facie case):

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, *subject, of course, to appellate review* . . . .

113 S.Ct. at 2756 (emphasis added). A court of appeals reviewing a finding of discrimination is faced with precisely the same question facing a district court on a summary judgment motion: whether a finder of fact could rationally find against the movant or appellant. *Anderson*

v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986); 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524, at 249-51 (2d ed. 1994). If an appellate court may reverse a finding of discrimination based on evidence sufficient to establish a prima facie case together with evidence that the employer's explanation is "unpersuasive or even obviously contrived," it cannot be the case that such evidence always entitles a plaintiff to survive defendant's motion for summary judgment. Yet that is precisely the rule of law the court of appeals articulated here (17a).

II.

The courts of appeals have reached divergent conclusions on the question presented here, largely because they differ in their interpretations of this Court's statement in *Hicks* that

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief if accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

(113 S. Ct. at 2749) The court of appeals below and some others have taken this language to mean that it is *always* within the province of the finder of fact to conclude that the defendant acted with discriminatory intent based upon the elements of a *McDonnell Douglas* prima facie case and evidence that the employer's proffered explanation is not true. Other courts of appeals have understood that language (correctly, J&H submits) to mean only that the probative value of such evidence will *sometimes* be sufficient to permit a finding of discrimination depending upon the totality of the record.

The First and Fifth Circuits have interpreted this Court's decisions as J&H urges here, *see Woods* v. *Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994); *Rhodes* v. *Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), and the Second Circuit is apparently in accord, *see Saulpaugh* v. *Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993). The First Circuit's recent opinion in *Woods* holds, for instance, that the language from *Hicks* quoted above:

> simply makes clear that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible. (For example, suppose an employee made out a truly bare-bones prima facie case of age discrimination, and the employer responded that the employee lacked the necessary skills for the job. Suppose also that unrefuted evidence showed that the response was a pretext, because the employer had fired the employee to conceal the employer's own acts of embezzlement. In such an instance, there would be a prima facie case at the outset and a disbelieved pretext, but we think it plain that no reasonable jury could find age discrimination on such a record.) The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts. (30 F.3d at 260 n.3)

In *Hicks*, this Court also presented a hypothetical case to show that the evidence supporting a prima facie case under *McDonnell Douglas* might ultimately have no probative value

whatever (113 S.Ct. at 2750-51). And in *Hazen Paper Co.* v. *Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993), consistently with the First Circuit's hypothetical in *Woods*, this Court cautioned that "inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where" other motives are present.

The Fourth, Sixth, Eighth and Ninth, and apparently the Tenth and Eleventh, Circuits have taken the view taken by the Third Circuit below. *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993), *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994); *Gaworski* v. *ITT Commercial Finance Corp.*, 17 F.3d 1104, 1109 (8th Cir. 1994); *Washington* v. *Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993); *Ingels* v. *Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994); *Hairston* v. *Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993). The Ninth Circuit, interpreting the above-quoted language from *Hicks*, stated:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment.

Washington, 10 F.3d at 1433.

The Seventh Circuit has gone both ways. *Compare Palucki* v. *Sears, Roebuck & Co.*, 879 F.2d 1568 (7th Cir. 1989) (decided prior to *Hicks*) and *Rand* v. *CF Industries, Inc.*, 42 F.3d 1139, 1146-47 (7th Cir. 1994), with *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994).

III.

An articulation by this Court of the proper standard by which to evaluate summary judgment motions in employment discrimination cases is a matter of substantial public importance. The *McDonnell Douglas* framework, which was first articulated in the context of alleged race discrimination in hiring under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1. *et seq.*, has since been extended (i) to the other forms of discrimination made unlawful by Title VII and virtually every kind of employment decision, including transfers, *see Goodwin* v. *St. Louis County Circuit Court*, 729 F.2d 541 (8th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985), promotions, *see Holmes* v. *Bevilacqua*, 794 F.2d 142 (4th Cir. 1986), demotions, *see Allen* v. *Montgomery County, Ala.*, 788 F.2d 1485 (11th Cir. 1986), training opportunities, *see Griffin* v. *City of Omaha*, 785 F.2d 620, *reh'g en banc denied*, 40 E.P.D. ¶ 36,151 (8th Cir. 1986), academic tenure, *see Namenwirth* v. *University of Wis. Bd. of Regents*, 769 F.2d 1235 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986), terminations, see *Bluebeard's Castle Hotel* v. *Virgin Islands Dep't of Labor*, 786 F.2d 168 (3d Cir. 1986), and discipline generally, *see Alires* v. *Amoco Prod. Co.*, 774 F.2d 409 (10th Cir. 1985); (ii) to age discrimination under the ADEA, *see Hazen*; (iii) to discrimination-in-employment claims cognizable under 42 U.S.C. §§ 1981 (*see Durham* v. *Xerox Corp.*, 18 F.3d 836 (10th Cir. 1994)) and 1983 (*see Hicks*, 113 S. Ct. at 2746 n.1); (iv) to claimed violations of the anti-discrimination provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140, *see Humphreys* v. *Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992) (compiling cases); (v) to alleged discrimination in violation of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, *see Robinson* v. *12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-39 (2d Cir. 1979); and (vi) perhaps also to alleged discrimination in

employment in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 *et seq.*, *see West* v. *Russell Corp.*, 868 F. Supp. 313, 316-17 (M.D. Ala. 1994); *but see Hedberg* v. *Indiana Bell Telephone Co.*, No. IP 93-1344-C, 1994 WL 228184, *6-*7 (S.D. Ind. Mar. 14, 1994).

The "Civil Rights Employment" category of cases filed in the district courts, into which most of the cases brought under the foregoing statutes fall, accounted for about six and a half percent of the cases filed in the district courts in 1994, a figure that has increased more than forty percent in the past two years. The Administrative Office of the United States Courts, *Statistical Tables*, Tables C-2 (1992-94). The number of charges filed with the Equal Employment Opportunity Commission has grown from 63,830 in fiscal 1991, EEOC, Combined Ann. Reps. 1991 & 1992 at 29, to 91,189 in fiscal 1994, Statement of Aletha L. Brown Before U.S. House Committee on Appropriations, Subcommittee on Commerce, Justice, State and Judiciary, March 1, 1995, *available in* 1995 WL 81600 (F.D.C.H.), an increase of forty percent in three years. This rate of growth promises to affect district court dockets increasingly in the years ahead.

If, as J&H submits, the standard applied by the court of appeals below and several other circuits is erroneous, the continued application of that standard will result in unnecessary expenditure of substantial public and private resources, because under that standard meritless cases will routinely survive summary judgment. Under *Burdine* an individual aggrieved by an employment decision who is a member of a group that is able to invoke the *McDonnell Douglas* framework, is required to adduce only minimal evidence to make out a prima facie case (450 U.S. at 253). More often than not, where the plaintiff is a present or former employee, the employer's nondiscriminatory reason for the adverse action will relate, in one way or another, to some aspect of job performance. Given the breadth of pretrial

discovery typically allowed and the infrequency with which human beings make judgments and take actions with respect to other human beings that cannot be made to appear problematic in *some* respect, it is often not difficult to create "a fact issue" with respect to an employee's performance that amounts to nothing more than a difference of opinion.[6] If

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[6] The court of appeals found that "three evidentiary threads" created a genuine issue as to whether Mr. Sempier had been terminated for poor performance (15a-18a). The first consisted of Mr. Sempier's assertions of his own good performance made in certifications submitted in connection with the parties' initial cross motions, and the positive statements regarding Mr. Sempier that Mr. Hatcher made (along with some negative ones) in his affidavit on the initial motions and his subsequent deposition (15a). Such evidence would be competent to establish only a common-place difference of opinion regarding Mr. Sempier's abilities and contribution to J&H as between Mr. Sempier and his sponsor, Mr. Hatcher, on the one hand, and Mr. Johnson, Mr. Hecken and other identified senior Directors on the other. However, the court of appeals found that a jury might reject the opinions of Messrs. Johnson *et al.* on the ground that if they had been honestly held, (i) J&H would have been able to produce more than it had by way of "performance reviews and other documentary evidence . . . that demonstrated poor performance" by Mr. Sempier of his CFO and CAO duties, and (ii) more would have been said to Mr. Sempier (than Mr. Sempier acknowledges was said) to bring home to him that his loss of responsibilities and inferior compensation (about which he did not deny having complained to Mr. Hecken; JA286-87) reflected a consensus among the Directors that his performance as a Director was "poor or inadequate." (16a.)

The second evidentiary thread was said to consist of certain documents, which the court of appeals styled as "two formal performance evaluations from 1988 and 1989" (16a). Mr. Sempier had attached them to one of his certifications on the initial motions with this one-sentence reference to them: "My performance always met or exceeded what was expected of me as demonstrated by the performance appraisals annexed to this certification" (JA306, 308-319). Mr. Hecken's *unanswered* affidavit on

(continued...)

that kind of issue between an employee who is able to invoke *McDonnell Douglas* and his or her employer, plus a prima facie case (which, for policy reasons having only to do with access to the courthouse, "is not intended to be onerous" (9a)), will *always* entitle the employee to a jury trial, the

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[6](...continued)
J&H's second summary-judgment motion explained what these documents were and how they were used, including the fact that they had been prepared by Mr. Sempier himself and included only a few terse (and ambiguous) comments by Mr. Hecken. Mr. Hecken further suggested that if the documents were but read in context they would demonstrate the contrary of what Mr. Sempier claimed they did. (JA784-89.) The district court credited Mr. Hecken's testimony because it was uncontroverted by Mr. Sempier, and held that the documents were of "little value in determining [Mr. Sempier's] true level of performance" (44a). The court of appeals held that the district court had thereby impermissibly weighed the evidence, because it had not taken into account references in Mr. Hatcher's deposition testimony to "performance evaluations," which the court of appeals assumed (without evidentiary foundation) related to the very same documents Mr. Hecken had addressed and contradicted what Mr. Hecken said about them (17a).

The final evidentiary thread did not relate to Mr. Sempier's performance. It consisted of circumstances that Mr. Sempier had unsuccessfully argued were direct evidence of age discrimination: a program targeting redundant and poorly performing employees that J&H had undertaken in mid-1989, the fact that Mr. Hatcher told Mr. Sempier in April 1990 that he would have to *retire*, and the terms of the retirement policy that the Board of Directors maintains for its members. (See 17a-18a.) On plenary review it will clearly appear that these circumstances raise no genuine issue as to any material fact and are of no probative value for Mr. Sempier's ADEA claim. However, the question presented by this Petition does not require that the probative value of that evidence actually be assessed by this Court; it will be J&H's position that under *Hicks*, *Aikens*, *Hazen* and *Anderson*, once the *McDonnell Douglas* presumption is out of the case, such evidence is entitled on summary judgment to whatever consideration it merits, along with all the other evidence, and without reference to where it might have "fit" in terms of the *McDonnell Douglas* framework.

unfairness to employers, to employees who cannot invoke *McDonnell Douglas*, and to overburdened district courts, is manifest.

What the rational development of employment-discrimination law very much needs at this juncture -- especially in the context of ADEA cases, which almost invariably concern long-service employees who typically have little problem establishing minimum qualifications for prima-facie-case purposes -- is an affirmation that an employer does not have to face a jury trial merely because the employee has some plausible basis for contending that the employer should not have taken the action about which he complains: "Whatever the employer's decisionmaking process," the employee must be able to adduce evidence which, regardless of its provenance in terms of the *McDonnell Douglas* framework, would entitle a jury to conclude that "the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen*, 113 S.Ct. at 1706.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

John F. Cannon
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

Robin D. Fessel
Sullivan & Cromwell
New York, New York

Francis X. Dee
David J. Reilly
Carpenter, Bennett & Morrissey
Newark, New Jersey

Of Counsel

April 13, 1995

APPENDIX

A. Opinion of the Court of Appeals for the Third Circuit Reversing the District Court's Grant of Summary Judgment

Filed January 6, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5208

BURT N. SEMPIER

Appellant

v.

JOHNSON & HIGGINS

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 92-01708)

Argued Friday, September 23, 1994
BEFORE: BECKER, COWEN and GARTH,
Circuit Judges

(Opinion filed January 6, 1995)

Charles F. Waskevich, Jr. (Argued)
Riker, Danzig, Scherer, Hyland
& Perretti
One Speedwell Avenue
Headquarters Plaza
Morristown, New Jersey 07962-1981

Attorney for Appellant

John F. Cannon
Sullivan & Cromwell
125 Broad Street
New York, New York 10004

Francis X. Dee (Argued)
Carpenter, Bennett & Morrissey
100 Mulberry Street
Three Gateway Center
Newark, New Jersey 07102

Attorney for Appellee

OPINION OF THE COURT

GARTH, *Circuit Judge*:

On March 9, 1994, the district court granted summary judgment in favor of Johnson & Higgins ("J & H"), the employer of appellant Burt Sempier. Sempier now appeals the district court's grant of summary judgment on his Age Discrimination in Employment Act (ADEA) claim, 29 U.S.C. § 263 (1988),[1] and the discretionary dismissal of his pendent

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[1] 29 U.S.C. § 623(a) in relevant part provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age....

state law claims. He also raises as error the district court's substitution of a "Bill of Particulars" in place of his interrogatories.

We have the jurisdiction pursuant to 28 U.S.C. § 1291 to review the March 9, 1994 final order of the district court. Because the record reflects a genuine issue of material fact regarding whether J & H's asserted nondiscriminatory reasons for discharging Sempier are pretextual, we will reverse the summary judgment entered in favor of J & H. We also conclude that the district court abused its discretion in substituting its own "Bill of Particulars" for Sempier's interrogatories.

I

Sempier joined appellee J & H, an insurance brokerage and employee benefits consulting firm, in 1968.[2] Sempier worked as Comptroller until 1971 when he became Treasurer of J & H. In 1984, J & H created a new position of Chief Financial Officer ("CFO"), and the Board of Directors elected Sempier to that post.

The parties dispute whether the J & H directors criticized Sempier's performance as CFO. Sempier avers that no one advised him that his performance was less than satisfactory nor did anyone bring to his attention any deficiencies in his performance of his functions. App. 300. Robert Hatcher, the firm's chairman who was Sempier's friend and had been instrumental in Sempier being elected as CFO, states that he was generally pleased with Sempier's work. At the same time, he acknowledges that other directors had criticized Sempier's performance. App. 363-65. Other J & H directors state in affidavits that they believed that Sempier performed below

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[2] J & H is a closely held New Jersey corporation. It operates as if it were a partnership. All stockholders are members of the firm. All directors are employees of the firm.

expectations. App. 727 (affidavit of Eric Johnson); App. 778-79 (affidavit of Kenneth Hecken).

In 1985, one year after Sempier assumed his duties as CFO, an outside audit of the Finance Department, requested by J & H director Eric Johnson, criticized the department's operations. App. 728-29. After further investigation, Johnson sought to have Sempier replaced. Despite Johnson's criticisms, J & H unanimously elected Sempier to the Board of Directors in 1986. Hatcher supported Sempier's election to the Board of Directors because he believed that this move would assist Sempier in improving the Finance Department's operations. When Sempier was elected, J & H required that he execute a letter of resignation that would become effective upon a two-thirds vote of the Board of Directors.

In May 1987, J & H removed Sempier from his responsibilities as CFO and made him Chief Administrative Officer ("CAO") in charge of Management Information Systems ("MIS"), Human Resources, Professional Development, and Real Estate and Facilities. Sempier was unanimously re-elected to the Board in 1989. Both sides dispute how Sempier performed as CAO.

Due to the increasing importance of MIS services and the department's unsatisfactory record, J & H decided to elevate the MIS department's status by hiring a Chief Information Officer ("CIO"), thereby removing MIS from Sempier's supervision. Notwithstanding some lobbying by Hatcher, the firm denied Sempier the CIO position. In December 1989, J & H hired Alan Page, who is fourteen years younger than Sempier, as CIO. The directors elected Page to the board in 1990.

Three months later, J & H hired Thomas Carpenter, who is four years younger than Sempier, to assume responsibility for Human Resources and Professional Development, starting in

May 1990. Carpenter's arrival left Sempier with significantly reduced responsibilities.

In May 1989, before either Page or Carpenter had been hired, J & H had instituted an early retirement program to retire "redundant" and "poorly performing" employees who were 55 years of age or older. App. 636-37. The firm intended to use the program either to "pull" employees into retirement through incentives or to "push" them into retirement through involuntary "terminations" which were to be characterized as downsizing. App. 637 (Exhibit 8).

In April 1990, Hatcher, who was still the Chairman of J & H, advised Sempier to retire early with certain enhancements to his existing retirement package. Hatcher stated that Sempier had "lost credibility" with unnamed senior managers. App. 301. Sempier refused to retire. Hatcher responded, using strong and unequivocal language, that Sempier had no choice but to retire or to be forced out. App. 302.

Between April 1990 and April 1991, J & H engaged in extended, and occasionally bitter, negotiations with Sempier seeking to obtain his retirement or resignation. In January 1991, David Olsen succeeded Hatcher as Chairman of J & H. When, in the spring of 1991, Sempier told Olsen that he had hired a lawyer, Olsen told Sempier that he could no longer return to J & H and should vacate his office. App. 81. At the same time, Olsen wrote the firm's general counsel that "[i]t's obviously time for hardball." App. 80. After Sempier consistently refused to retire, the Board made effective Sempier's previously executed resignation in June 1991.

Sempier filed an age discrimination claim with the Equal Employment Opportunity Commission, received a right to sue letter, and instituted an ADEA suit in the District of New Jersey with pendent state law claims for breach of contract as well as violations of the New Jersey Law Against Discrimination and the New Jersey Business Corporations Act. J & H

answered that Sempier had been discharged for poor performance.

At the outset of the litigation, Sempier served two sets of interrogatories and a series of document requests on J & H. When J & H refused to respond to a substantial portion of the discovery requested, Sempier sought an order from the magistrate judge which would have compelled J & H to respond. The magistrate judge denied Sempier's motion. On appeal, the district court judge vacated the order of denial but remanded the dispute to the magistrate judge without entering an order compelling discovery. On remand, the magistrate judge relieved J & H from answering the original two sets of interrogatories and required that Sempier draft a third set of interrogatories. App. 563-64. After J & H refused to answer almost all of these interrogatories, Sempier again sought a second order compelling discovery. The magistrate judge denied Sempier's motion to compel answers and ordered J & H to provide information responding to a "Bill of Particulars" drafted by the court. App. 576. On appeal, the district court affirmed the magistrate judge's order and added one question of its own to the "Bill of Particulars."

Between November and December 1993, the parties disputed whether J & H had complied with the court's orders to answer the court's questions and to provide documents. In December, Sempier filed additional motions for an order to compel discovery and for partial summary judgment. J & H replied with its motion for summary judgment.

The district court granted J & H's summary judgment motion on the ADEA claim and dismissed the remaining pendent claims without prejudice. The district court expressed concern that Sempier had not made out a prima facie case because of an inability to show that he was a qualified employee or replaced by a sufficiently younger employee to raise an inference of age discrimination. Nonetheless, it turned to J & H's

asserted nondiscriminatory reasons for Sempier's discharge and Sempier's evidence of pretext.

The district court found that J & H had come forward with two alleged reasons for Sempier's discharge: (1) that Sempier's reduced responsibilities did not justify his continued presence on the Board of Directors and (2) that Sempier's poor performance had justified the reduction in his responsibilities and eventual discharge. Moreover, the district court held that Sempier had not produced sufficient evidence to allow a jury to find that J & H's alleged nondiscriminatory reasons were a pretext for discrimination. Accordingly, the court entered a judgment in favor of J & H, denied Sempier's motion for partial summary judgment, and dismissed Sempier's pendent state law claims without prejudice.

Sempier filed a timely appeal.

II

A.

When we review a grant of summary judgment, we apply the same test that the district court should have applied initially. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (en banc), *cert. dism'd*, 483 U.S. 1052 (1987). Summary judgment is appropriate only when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; *see* Fed. R. Civ. Proc. 56(c) (1994). When the moving party (here, J & H) does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's (here, Sempier's) evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party creates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable

jury to find for him at trial. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986).

In reviewing the record, the court must give the nonmoving party the benefit of all reasonable inferences. *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632, 637 (3d Cir. 1993); *Gray v. York Newspapers, Inc.,* 957 F.2d 1070, 1077 (3d Cir. 1992); *Chipollini,* 814 F.2d at 900; *see also id.* at 901 (discussing the impropriety of credibility determinations on summary judgment); *Josey,* 996 F.2d at 639 (same).

B.

Sempier prosecuted his case on the "pretext" theory announced in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and later clarified in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 113 S. Ct. 2742 (1993).[3]

As applied to ADEA cases, the plaintiff establishes a prima facie case by showing that (1) he is over 40, (2) he is qualified for the position in question, (3) he suffered an adverse employment decision, and (4) he was replaced by a sufficiently younger person to create an inference of age discrimination. *Chipollini,* 814 F.2d at 897.[4] This showing creates a

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[3] Although the pretext framework originated in the context of Title VII, it has been applied to the ADEA. *See, e.g., Geary v. Visitation of the Blessed Virgin Mary Parish School,* 7 F.3d 324 n.4 (3d Cir. 1993).

[4] Sempier's complaint appears to suggest that J & H violated the ADEA not only by discharging him as an employee but also by removing him as a director. For the most part, the record and the parties' briefs treat these two events as functionally identical. Whether the ADEA extends to cover Sempier's status as a director is a function of Sempier's duties and not his title. *See Nationwide Mutual Insurance Co. v. Darden,* 112 S. Ct. 1344, 1348-49 (1992) (considering the definition of employee under ERISA); *Frankel v. Bally, Inc.,* 987 F.2d 86, 89-91 (2d Cir. 1993) (considering the test for who is covered under the ADEA); *Equal Employment Opportunity*

(Footnote continued)

presumption of age discrimination that the employer must rebut by stating a legitimate nondiscriminatory reason for the adverse employment decision. *Hicks,* ___ U.S. at ___, 113 S. Ct. at 2747; *Chipollini,* 814 F.2d at 897. The plaintiff then has the opportunity to demonstrate that the employer's stated reasons were not its true reasons but were a pretext for discrimination. *Hicks,* ___ U.S. at ___, 113 S. Ct. at 2747; *Chipollini,* 814 F.2d at 897. He may do this through direct or circumstantial evidence of falsity or discrimination. *Chauhan v. M. Alfieri Co., Inc.,* 897 F.2d 123, 128 (3d Cir. 1990); *Chipollini,* 814 F.2d at 898-99.

Moreover, to defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence. *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir. 1994). A plaintiff is not required to produce evidence which necessarily leads to the conclusion "that the employer did not act for the nondiscriminatory reasons." *Sorba v. Pennsylvania Drilling Co.,* 821 F.2d 200, 205 (3d Cir. 1987), *cert. denied,* 484 U.S. 1019 (1988).

III

Without holding that Sempier failed to establish a prima facie case, the district court questioned whether Sempier

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Commission v. Zippo Manufacturing Co., 713 F.2d 32, 36-38 (3d Cir. 1983) (same); *Equal Employment Opportunity Commission v. First Catholic Slovak Ladies Association,* 694 F.2d 1068, 1070 (6th Cir. 1982) (holding that plaintiff's status as a director did not prevent the application of the ADEA to plaintiff's position as an employee), *cert. denied,* 464 U.S. 819 (1983). To the extent that Sempier on remand pursues relief related to his status as a director, this issue should be resolved by trial on the basis of the parties' proof of his functions at J & H in that capacity.

made out a prima facie case of discrimination. The district court doubted that Sempier had shown that he was qualified to work as the Chief Administrative Officer of J & H and doubted that he was replaced by a sufficiently younger employee to raise an inference of age discrimination.

We note however that the prima facie case under the *McDonnell Douglas-Burdine* pretext framework is not intended to be onerous. *Burdine,* 450 U.S. at 253. The prima facie case merely "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Co. v. Waters,* 438 U.S. 567, 577 (1978).

A.

We determine a plaintiff's qualifications for purposes of proving a prima facie case by an objective standard. *Weldon v. Kraft, Inc.,* 896 F.2d 793, 798 (3d Cir. 1990); *Jalil v. Avdel Corp.,* 873 F.2d 701, 707 (3d Cir. 1989), *cert. denied,* 493 U.S. 1023 (1990). "[W]hile objective job qualifications should be considered in evaluating the plaintiff's *prima facie* case, the question of whether an employee possesses a subjective quality, such as leadership or management skill, is better left to" consideration of whether the employer's nondiscriminatory reason for discharge is pretext. *Weldon,* 896 F.2d at 798. "Thus, to deny the plaintiff an opportunity to move beyond the initial stage of establishing a prima facie case because he has failed to introduce evidence showing he possesses certain subjective qualities would improperly prevent the court from examining the criteria to determine whether their use was mere pretext." *Id.* at 798-99.

Here, the district court misapplied this rule when it evaluated Sempier's qualification by reference to J & H's subjective criticism that Sempier lacked "management oriented" skills and leadership ability. App. 895. Sempier had the

objective experience and education necessary to qualify as a viable candidate for the positions he held. He had held executive level positions at J & H for over twenty years.

Sempier also relied on the affidavit and depositions of Hatcher, J & H's chairman. Hatcher had testified that he had been satisfied with Sempier's performance. App. 895. In response to this record, the district court observed, "[a]lthough it would be unusual for a corporation to place an unqualified individual in an executive position, it is not unimaginable." App. 896-97. In so stating, the district court failed, as required on summary judgment, to consider the evidence in the light most favorable to Sempier, the nonmoving party. *See Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 637 (3d Cir. 1993); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1077 (3d Cir. 1992); *Chipollini*, 814 F.2d at 900. Indeed, the district court apparently inferred that Sempier was unqualified for the position he held.

Contrary to the inference of the district court, if we consider the evidence in the light most favorable to Sempier, the record of his twenty years employment as an executive, his record as Comptroller and then Treasurer of J & H, his election to the Board on two occasions, and his appointment as Chief Financial Officer and then as Chief Administrative Officer leads to the almost inevitable inference that he was qualified for the position from which he was discharged. As we have said in a similar context, "[t]hus, [plaintiff's] satisfactory performance of duties over a long period of time leading to a promotion clearly established his qualifications for the job." *Jalil*, 873 F.2d at 707. Sempier's qualifications therefore satisfy the second prong of the prima facie case that Sempier was charged with establishing, thus putting to rest the doubts raised by the district court.

B.

To complete his prima facie case, Sempier does not need to produce compelling evidence or conclusive proof that J & H's adverse employment decision resulted from age discrimination. *Chipollini,* 814 F.2d at 900. Rather he may point to a sufficient age difference between himself and his replacement such that a fact-finder can reasonably conclude that the employment decision was made on the basis of age. *Maxfield v. Sinclair Intern'l,* 766 F.2d 788, 792 (3d Cir.), *cert. denied* 474 U.S. 1057 (1985). Nor is there any particular age difference that must be shown. *Id.* Different courts have held, for instance, that a five year difference can be sufficient, *Douglas v. Anderson,* 656 F.2d 528, 533 (9th Cir. 1981), but that a one year difference cannot. *Gray,* 957 F.2d at 1087.

The district court in this case considered only the four year age difference between Sempier and Carpenter, who had taken over some of Sempier's responsibilities. However, we are not limited to considering only Sempier's final replacement. Four months prior to the date that Carpenter became responsible for Human Resources and Professional Development at J & H, a substantial portion of Sempier's other functions were transferred to Alan Page. Page is well over ten years younger than Sempier. App. 711. The combined differences in age between Sempier on the one hand and Page and Carpenter on the other is clearly sufficient to satisfy the fourth prong of a prima facie case by raising an inference of age discrimination.[5]

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[5] J & H contends that we cannot consider the transfer of Sempier's duties to Page because it occurred outside of the 300 day period for filing a separate claim of age discrimination. J & H's Brief at 38; *see* 29 U.S.C. § 626(d) (providing a 300 day period in which to file an administrative charge).

(Footnote continued)

IV

A.

Having concluded that the record is more than sufficient to dispel the district court's doubts as to Sempier's prima facie case, we turn now to consider the evidence of J & H's alleged reasons for Sempier's discharge. As we earlier stated, after the plaintiff has established a prima facie case, the employer must produce evidence of a nondiscriminatory reason to rebut the presumption of discrimination created by the prima facie case. *Hicks*, __ U.S. at __, 113 S. Ct. at 2747; *Chipollini,* 814 F.2d at 897.

Here, J & H has presented two reasons. First, J & H states that it terminated Sempier because his company duties no longer justified retaining him in his position. Second, it contends that Sempier performed those duties poorly. J & H attempted to establish each of these justifications through

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The argument is disingenuous. J & H relies on the incremental removal of Sempier's management responsibility over Management Information Systems to justify Sempier's dismissal; however, J & H asks us to limit our consideration of Sempier's case to the facts that fall within the 300 days immediately prior to when Sempier filed his administrative charge. Although Carpenter was the last person to assume any of Sempier's responsibilities, the process that led to Sempier's eventual discharge began with the transfer of MIS authority from Sempier to Page.

The statute of limitations for filing a charge of discrimination may have barred our consideration of the transfer of MIS authority to Page if that was Sempier's cause of action, but it does not prevent us from considering that event in order to determine whether Sempier has raised an inference of age discrimination as a part of his prima facie case. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (barring a separate claim of discrimination, but permitting use of the prior events as evidence to prove a case of discrimination based on a separate claim); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1420-21 (3d Cir.), *cert. denied*, 112 S. Ct. 379 (1991).

affidavits of J & H executives and directors. As we understand the record, J & H's nondiscriminatory reasons for Sempier's discharge come down to this: Sempier performed so poorly that almost all of his responsibilities at the firm were transferred to others, leading ultimately to Sempier's discharge.

J & H produced the affidavits of two directors, who had previously supervised Sempier, reflecting the directors' discontent with Sempier's work. App. 778-79, 783-84 (affidavit of Hecken); App. 726-32 (affidavit of Johnson). Additionally, Hatcher's affidavit averred that many directors did not regard Sempier highly and that Hatcher had used his influence to have Sempier elected to the Board against the other directors' wishes. App. 365, 369-70. To corroborate these assertions, J & H included a consultant's report that criticized the operations of the finance department during 1985-1987 when Sempier served as CFO. App. 738-749. Finally, the company produced documents disclosing that Sempier received less compensation from the directors' merit compensation pool than some of the other directors who held comparable positions.

B.

On the other hand, Sempier claims that these allegations of poor performance are not worthy of credence and are no more than a pretext for discrimination. The Supreme Court, in *Saint Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993), recently clarified the showing of pretext that a plaintiff must make to win a discrimination case. Rejection of the employer's nondiscriminatory explanation does not compel a verdict in favor of the employee, but it permits the trier of fact to infer discrimination and find for the plaintiff on the basis of the allegations of discrimination in his prima facie case. *Hicks*, __ U.S. at __, 113 S. Ct. at 2749; *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994); *Seman v. Coplay Cement Co.*, 26 F.3d 428, 433 (3d Cir. 1994). "The factfinder's

disbelief of the reasons put forward by the [employer] . . . may, together with the elements of the [employee's] prima facie case, suffice to show intentional discrimination." *Hicks*, __ U.S. at __; 113 S. Ct. at 2749.

Accordingly, "a plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes*, 32 F.3d at 764 (emphasis in original). If the plaintiff produces sufficient evidence of pretext, he need not produce additional evidence of discrimination beyond his prima facie case to proceed to trial. *Id.*

Pretext is not demonstrated by showing simply that the employer was mistaken. *Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509, 531 (3d Cir. 1992), *cert. denied,* 114 S. Ct. 88 (1993). Instead the record is examined for evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons. *Josey v. John R. Hollinsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993).

Thus, we turn to the record to determine whether Sempier has produced sufficient evidence to allow a jury to find that J & H did not terminate him for poor performance. Sempier emphasizes three evidentiary threads which create a genuine issue of material fact. He first points to statements in his own affidavit, in Hatcher's affidavit, and in Hatcher's deposition testimony that his performance was satisfactory. App. 321, 325 (Sempier); App. 363-65 (Hatcher); App. 797 (Hatcher). The district court found that Hatcher's additional statement that other directors did not agree with Hatcher's favorable assessment undermined the credibility of Hatcher's assertions of satisfactory performance. While we may or may not find Sempier's self evaluation and Hatcher's assessments of

Sempier's performance to be compelling evaluations of Sempier's work, it is neither our role nor the district court's role on summary judgment to compare the testimony of various affiants and decide who is credible. *Chipollini,* 814 F.2d at 901; *Josey,* 996 F.2d at 637.

The district court, citing *Billet v. CIGNA Corp.,* 940 F.2d 812 (3d Cir. 1991), also concluded that Sempier's self evaluation was meaningless because only J & H's evaluation of Sempier's performance was at issue. *Billet* states that the inquiry into pretext centers upon the employer's beliefs and not the employee's own perceptions. *Id.* at 825 ("However, [plaintiff's] view of his performance is not at issue; what matters is the perception of the decision maker."). Nonetheless, *Billet* does not stand for the proposition that the employee's belief that his performance was satisfactory is never relevant. *Billet* concluded that the employee's assertions of his own good performance were insufficient to prevent summary judgment where the employer produced performance reviews and other documentary evidence of misconduct and insubordination that demonstrated poor performance. *Id.* at 818-22.

Where, as here, Sempier asserts not only that he performed well but that he never received any unfavorable criticism that his performance was poor or inadequate, the jury could conclude that J & H's failure to fault Sempier's performance for the twenty years prior to the negotiations leading to his discharge makes suspect its *post hoc* assertions of poor performance. This is especially true when J & H has failed to produce any other evidence of poor performance or make specific allegations of Sempier's deficiencies.

Sempier next points to two formal performance evaluations from 1988 and 1989 in which Hecken, Sempier's supervisor, wrote that Sempier's performance was satisfactory. App. 308-19. In considering these evaluations, the district court stated,

solely on the basis of Hecken's affidavit, that "[the] evaluations were a first attempt by Defendant to open the lines of communication between lower level directors and the senior members of the board to whom they reported. Viewed in this light, they are of little value in determining Plaintiff's true level of performance." App. 906. In so stating, the district court ignored the testimony of Hatcher at his deposition that any critical comments concerning Sempier's performance should be recorded in the performance evaluations. App. 799. Hatcher also said that the compensation committee had previously used the evaluations in determining directors' compensation. App. 824-26. On summary judgment, it is not the court's role to weigh the disputed evidence and decide which is more probative.

Finally, Sempier points to the coercive early retirement program that J & H instituted shortly before it forced Sempier's resignation. J & H documents showed that the company instituted this program to generate a significant number of retirements largely through monetary incentives. The district court correctly concluded that the use of an early retirement program to dismiss redundant or underperforming employees is not by itself a violation of the ADEA. *See Gray v. York Newspapers,* 957 F.2d 1070, 1080-81 (3d Cir. 1992); *Colgan v. Fisher Scientific Co.,* 935 F.2d 1407, 1422 (3d Cir.), *cert. denied,* 112 S. Ct. 379 (1991). On the other hand, an early retirement program designed to force employees who reach a senior age to leave or face significant pressure to resign or retire might itself create an inference of age discrimination. *Gray,* 957 U.S. at 1081 (citing *Henn v. National Geographic Soc'y,* 819 F.2d 824, 826, 828-29 (7th Cir.), *cert. denied,* 484 U.S. 964 (1987)). It is impermissible to force older employees to choose between retirement or termination in an effort to eliminate older workers on account of their age.

The record clearly discloses that Hatcher told Sempier in no uncertain terms that he could either retire, face continuing pressures to retire, or be terminated.[6] The record also reflects a mandatory policy at J & H that directors must retire at set intervals corresponding to age. Later, after the company learned that Sempier had sought legal counsel, Olsen, J & H's Chairman, told Sempier to pack his office and leave. While this evidence does not itself establish age discrimination, a jury might reasonably determine from these events that J & H offered Sempier early retirement as an effort to remove him because of his age and not because of poor performance.

In cases such as the present one, the question for the court is whether the record "*could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to that conclusion that the employer did act for discriminatory reasons." *Chipollini,* 814 F.2d at 900 (emphasis in original); *see also Fuentes,* 32 F.3d at 764 (stating that the plaintiff need not show more than that the employer's articulated reasons were implausible to survive summary judgment). When the evidence is read in the light most favorable to Sempier, a jury could reasonably find that J & H did not terminate him because of poor performance but rather discharged him because of his age.

V

To recap, once Sempier had made out a prima facie case of age discrimination, a presumption arose that J & H had discriminated against him. *Burdine*, 450 U.S. at 254. J & H dispelled that presumption by coming forward with a

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[6] In the April meeting at which Hatcher recommended early retirement, Sempier recites that Hatcher told Sempier that unnamed J & H managers "would let me [Sempier] rot, would cut my balls off and otherwise make it unpleasant for me to stay." App. 302.

nondiscriminatory reason for Sempier's discharge, leaving nothing but the permissible inference of discrimination created by the prima facie case. *Hicks*, __ U.S. at __; 113 S. Ct. at 2748-49. Sempier's attack on J & H's stated reasons for his discharge leaves us with the paradigmatic case in which each party has produced testimony and evidence that conflicts on the ultimate issue — whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. Thus, the summary judgment entered in favor of J & H must be reversed.[7]

VI

In addition to challenging the district court's order which granted summary judgment to J & H, an order which we now hold must be reversed, Sempier also complains that the district court abused its discretion in ruling on his discovery efforts. In so doing, Sempier contends that he was prevented from marshalling additional evidence establishing that J & H's proffered reason for his discharge was pretextual.[8]

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[7] Sempier also raises as error the district court's denial of a partial summary judgment in his favor on the issue of liability. Sempier argues that J & H presented no evidence of his poor performance. As we have discussed in text, the record reflects that both Sempier and J & H have adduced conflicting evidence over the reason for his discharge. This resulting conflict could not be resolved by summary judgment in Sempier's favor.

[8] Sempier strongly disputes J & H's contention that he had chosen to resist J & H's renewed motion for summary judgment without completing the depositions that had been scheduled. Sempier claims that the documents he sought from J & H were essential in order to conduct his remaining depositions. He asserts that the district court for that reason alone should have denied J & H's motion for summary judgment and should have permitted Sempier to complete his discovery. (Sempier Reply Brief at p. 23.)

We normally do not become involved with "nitty gritty" rulings on discovery matters. Nor do we generally engage in exercises to determine whether a party's interrogatories are relevant or are unduly burdensome. This appeal, however, requires that we review the actions taken by the magistrate judge and the district court judge with respect to discovery sought and answered by the parties. While we will not examine each jot and tittle of the discovery process, it is important to our analysis that some background be furnished.

Sempier's complaint was filed in April 1992. In June 1992, Sempier served his first set of interrogatories and a request for production of documents. In July 1992, Sempier served a second set of interrogatories with a second request for production of documents. Unfortunately, not all of the interrogatories that were served have found their way into the record, and thus, into the appendix. We have examined those that have been reproduced in the appendix, and we find it difficult to understand how the magistrate judge could have condoned the answers given by J & H. Moreover, we are perplexed by the failure of the magistrate judge or the district court judge to compel responsive answers to the interrogatories — almost all of which appear to us to be relevant and directed to the issues of Sempier's employment, performance and relationship with J & H.

For example, Interrogatory No. 36 sought the name of each and every person who had supervision and/or control over Sempier from January 1, 1986 through the termination of Sempier's employment. It also sought, with respect to each such supervisor identified, the job title, the department supervised, the duties and responsibilities of the job, the date on which he or she assumed the supervisory position, and, if the individual was not still employed, the date and reason of termination and the last known address. True, that interrogatory sought as well the date of hire, date of birth and educational background, but those three inquiries, if not deemed relevant

in the district court's judgment, could have been excised and the remainder of the interrogatory answered. Yet J & H objected to the interrogatory on the grounds that it was "overbroad, unduly burdensome, and exceeding the scope of permissible discovery." J & H then referred Sempier to a J & H Position Statement which does not even appear to be part of the record.

Again, Interrogatory No. 44 asked J & H if it voluntarily terminated the employment and/or relationship of Sempier with J & H. J & H's response reads: "Defendant refers plaintiff to pages 3 through 17 of the J & H Position Statement." The following interrogatory, Interrogatory No. 45, sought the dates on which the decision to terminate Sempier was made, and J & H's response was "See Interrogatory No. 44." Interrogatory No. 46 sought the factual basis for J & H's decision to terminate Sempier and/or the relationship of Sempier with J & H. The answer given by J & H: "Defendant refers plaintiff to the J & H Position Statement." The other interrogatories which we have reviewed — all seemingly relevant — have been answered in much the same manner. All of J & H's answers disregard the requirements of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 33(a) (requiring separate and complete answers unless specific objections are provided); 26(b) (defining the scope of discovery) (1933 version).[9]

Without dwelling further on this subject, we observe that the magistrate judge did not compel the answers which

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[9] Lead counsel for J & H is apparently the New York law firm of Sullivan & Cromwell. Perhaps this accounts for the lack of familiarity with New Jersey Federal Court practice. We note, however, that J & H had local counsel. It is a matter of concern to us that the discovery practice in this case was so badly abused when at the least, local counsel had to have recognized the need to conform to the standards of discovery practice which have long been established in the District of New Jersey.

Sempier sought. Rather, he relieved J & H from answering the various discovery requests and instructed Sempier to issue a third set of interrogatories and a third document request. The latter two discovery requests were no more answered than the earlier ones. In lieu of compelling answers to the third set of interrogatories served by Sempier, the district court instructed J & H to answer a four question "Bill of Particulars."

Against this background, we consider Sempier's arguments. Under the Federal Rules of Civil Procedure and our jurisprudence, district courts have broad discretion to manage discovery. *See, e.g., Walter v. Holiday Inns, Inc,* 985 F.2d 1232, 1237 n.4 (3d Cir. 1993) (allowing over a one year delay in the production of documents is not an abuse of discretion); *Beard v. Braunstein*, 914 F.2d 434, 446 (3d Cir. 1990) (affirming monetary sanction for failure to answer interrogatories); *Comdyne I, Inc. v. Corbin*, 908 F.2d 1142, 1146 (3d Cir. 1990) (affirming district court order striking the pleadings for failure to answer interrogatories). Nonetheless, the district court's discretion has boundaries, and in particular, we frown upon unnecessary discovery limitations in Title VII, and hence ADEA, cases. *See Trevino v. Celanese Corp.*, 701 F.2d 397, 405 (5th Cir. 1983). In such cases, other courts have refused, and now we refuse, "to allow procedural technicalities to impede the full vindication of guaranteed rights." *Id.* at 406. A plaintiff in an ADEA case, as Sempier is here, should not be hamstrung by the district court in limiting his discovery. In substituting a "Bill of Particulars" for those means of discovery authorized by the Federal Rules of Civil Procedure, the district court here far exceeded the outermost limits on its discretion.

Since 1938, civil discovery has been an attorney-initiated, attorney-focused procedure. The vast majority of federal discovery tools operate, when used properly, almost entirely without the court's involvement. *See* Fed. R. Civ. P. 26(f) (requiring the parties to devise and submit a discovery plan);

Fed. R. Civ. P. 30 ("[A] party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court."); Fed. R. Civ. P. 34(b) (production of documents); *cf.* Fed. R. Civ. P. 35 (providing for physical examinations only by leave of the court); *see also* William Schwartzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 714-16 (1989).

Indeed under the recent amendments to Federal Rule of Civil Procedure 26(a), which became effective December 1, 1993 in the District of New Jersey, a party must provide discovery "without waiting [for] a discovery request." Under this scheme, when civil litigation proceeds smoothly, the parties conduct discovery with minimal interference from and minimal appeal to the court. Through the discovery process, even before the amendments became effective, the *attorneys* obtain answers to questions that they feel are relevant to the issues if not determinative of the issues. 8A Charles Allen Wright & Arthur P. Miller, Federal Practice and Procedure §2162 (1970). Nowhere in the process is the district court authorized to initiate its own questioning or to seek documents for itself. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 827-30 (1985) (noting the difference between civil law procedure in which judges initiate the investigation and common law procedure in which the parties conduct the investigation).

When the parties stray from this course, Rule 37 provides the court with tools to give the litigants new and proper bearings. A court may compel answers to interrogatories or deposition questions, compel the production of documents, or conversely, grant protective orders. Fed. R. Civ. P. 37; Fed. R. Civ. P. 26(b)(5)(c). If these measures fail, a court may order facts established, forbid the introduction of evidence, strike the pleadings, file a default judgment, dismiss the action, or hold a party in contempt of court. Fed. R. Civ. P.

37(b); *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (upholding dismissal of a claim for discovery violations); *Quinter v. Volkswagen of America,* 676 F.2d 969 (3d Cir. 1982) (affirming an order holding a party in contempt for violation of discovery procedures). However, none of the weapons in this formidable arsenal include the wholesale substitution of court-engineered discovery.

The district court was evidently not content with the contents of its discovery arsenal. Rather, it abandoned the structure and command of the Rules to revive a procedural device abandoned in civil practice forty-five years ago. *See Singer Manufacturing Co. v. Axelrod,* 16 F.R.D. 460, 461 (S.D.N.Y. 1954) (noting the elimination of the "Bill of Particulars" in favor of interrogatories in 1948); Wright & Miller, *supra* §2167 (1970 & supp. 1994) (stating that Fed. R. Civ. P. 33 replaced the "Bill of Particulars" in equity in 1948 without lament). Although still used in criminal matters, a "Bill of Particulars" has not graced the shores of federal civil discovery since the 1950s. 8 James Wm. Moore, Moore's Federal Practice ¶7.06[1] (2d ed. 1994). Even in criminal matters, a "Bill of Particulars" is not generally considered a discovery device. *Id.* (citing among other cases *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985)). In this case, it was not only an unwelcome and inappropriate incursion by the district court into the parties' dispute, but it severely trenched upon the Rules of Civil Procedure which have been crafted to provide information as to matters relevant to the issues disputed. Fed. R. Civ. P. 26(d)(1).

Sempier had served his interrogatories in compliance with Federal Rule of Civil Procedure 33. The Rule provides, "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable."

J & H believed the interrogatories were objectionable and stated its objections. Sempier sought to compel answers.

The court could have denied the discovery on the ground that it was privileged, burdensome, duplicative, or otherwise outside of the scope of discovery. Fed. R. Civ. P. 26(b). It could have compelled answers and awarded attorney's fees and/or sanctions. Fed. R. Civ. P. 37(b). It did none of these things nor did it comply with its obligation to consider and rule upon each interrogatory to which J & H objected. *See Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 135 F.R.D. 101, 109-112 (D.N.J. 1990); *Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 57-60 (D.N.J. 1983). Rather than rule upon the objections, the district court decided that "[the] Magistrate Judge . . . provided a mechanism (bill of particulars) for further discovery regarding the precise issue outlined in this Court's September 7, 1993 Order." App. 611.

The district court may have disliked its obligation to examine each interrogatory and review the magistrate judge's ruling. Regardless of its feelings, the district court, guided only by its own discretion and determination of what is important or relevant, could not rewrite a party's questions and in effect serve its own set of interrogatories. When the court took upon itself to author the questions being asked, it virtually became a participant in the parties' controversy in a manner inconsistent with fundamental conceptions of the role of a judge in our common law system.

In this case, the district court reformulated Sempier's interrogatories into four broad questions about Sempier's performance. The magistrate judge reframed specific requests pertaining to the reasons considered by J & H, and the reasons upon which J & H actually relied to terminate Sempier, into a vague question, "[w]hy were Plaintiff's job responsibilities reassigned?" Pertinent and direct interrogatories, that were propounded by Sempier, sought the dates of conversations regarding Sempier's performance and the names of the

participants in those discussions. Those interrogatories were replaced by the district court with a vague and general "Bill of Particulars." Because the district court's questions were, with one exception, general, nonspecific, and broad, the resulting answers, to the extent that they answered the questions at all, were uninformative and of little value. Sempier had good reason to draft specific interrogatories and had a right to expect correspondingly specific answers. The district court's substitution of its own work product denied Sempier this opportunity.

We have examined the Supplemental Bill of Particulars (App. 766-772) which contains the questions framed by the magistrate judge and the district court judge, and we have examined closely J & H's answers. Those answers can best be described as an attempt, if not to outwit, then to frustrate all legitimate efforts to furnish information to an adversary.[10] Moreover, whereas Federal Rule of Civil Procedure 33 provides that interrogatories must be answered under oath and thus may be evidentiary, there is no such provision in the Federal Rules of Civil Procedure for a "Bill of Particulars." Indeed, there is no provision at all for "Bills of Particulars" — and for good reason. As we have noted, "Bills of Particulars" were replaced by the discovery rules of the Federal Rules of Civil Procedure. Wright & Miller, *supra* §2167.

The district court's action was unauthorized by the Federal Rules of Civil Procedure and in violation of the principles of our jurisprudence. The Federal Rules of Civil Procedure, which must obtain Supreme Court and Congressional approval, not only prescribe the procedures to be followed by counsel, but they also prescribe the Rules under which the courts operate. *See Umbenhauer v. Woog*, 969 F.2d 25, 32 (3d

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[10] *See* note 9 *supra*.

Cir. 1992) ("Neither we, the Department of State, nor the Administrative Office of the United States Courts possess the authority to circumvent, ignore or deviate from the Federal Rules of Civil Procedure, which were approved by the Judicial Conference of the United States, the Supreme Court of the United States, and Congress.") By venturing so far outside the parameters set by the Rules, the court abused its discretion.

Our discussion and holding here does not leave the district court powerless to manage the discovery difficulties presented by this and similar cases. On the contrary, the district court has considerable authority and discretion by which to resolve discovery disputes. Indeed, if discovery has reached an impasse or a nonproductive stage either through counsel's obstinacy, intransigence, or even incompetence, the district court can always, through appropriate intervention, suggest the proper manner in which questions should be asked and the answers furnished. A district court's creativity in this respect is unrestricted, although it cannot, of course, disregard the commands of the Federal Rules of Civil Procedure or, as in this case, substitute a "Bill of Particulars" for a party's relevant discovery. It can, however, always give counsel guidance and direction as to the manner in which discovery should proceed.

If, after an examination of a party's interrogatories, the district court determines that the interrogatories are inappropriate, the court can refuse to compel answers. If a party is unable to draft satisfactory interrogatories after a reasonable time for discovery has concluded, the court can limit further discovery. If the court feels either party was acting in bad faith, it can impose sanctions. Certainly, if a party, without justification, refuses to answer interrogatories in the manner required by Federal Rule of Civil Procedure 33, the court can compel answers under threat of sanctions. Any or all of these options could have been employed in this case. Any and all of these options would have received substantial deference upon review.

VII

We will reverse the summary judgment of the district court dated March 9, 1994 and remand. On remand, the district court is directed to vacate the magistrate judge's order of August 7, 1993 and to vacate its own order of November 3, 1993 which approved and modified a "Bill of Particulars." The district court is also directed to permit and schedule additional appropriate and adequate discovery pursuant to the Federal Rules of Civil Procedure so that further proceedings, including trial, may be conducted consistent with the foregoing opinion.[11]

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[11] The district court's order of March 9, 1994 dismissed Counts Four through Six without prejudice to Sempier proceeding on those counts in state court. Those counts involved state law contract and corporate law causes of action. The record before us is accordingly silent as to those matters. Nor do we know if those claims are proceeding in state court. It will be for the district court on remand to ascertain and resolve the status of those claims.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5208

BURT N. SEMPIER, *Appellant*
v.
JOHNSON & HIGGINS

On Appeal from the United States District Court
for the District of New Jersey
(D. C. Civil No. 92-1708)

Present: Becker, Cowen and Garth, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 23, 1994.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 11, 1994, be, and the same is hereby reversed and the cause remanded on the said District Court. On remand the District Court in directed to vacate the magistrate judge's order of August 7, 1993 and to vacate its own order of November 3, 1993 which approved and modified a "Bill of Particulars." The said District Court is also directed to permit and schedule additional appropriate and adequate discovery so that further proceedings, including trial, may be conducted consistent with the opinion of this Court. Costs taxed against the appellee. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

January 6, 1995

B. Order of the Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5208

BURT N. SEMPIER

Appellant

v.

JOHNSON & HIGGINS

(D.C. Civil No. 92-01708)

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN, *Circuit Judges,* and GARTH, *Senior Circuit Judge.**

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active

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*. As to panel rehearing only.

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: **February 14, 1995**

C. Memorandum and Order of the United States District Court for the District of New Jersey Granting Summary Judgment

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BURT N. SEMPIER, Plaintiff,	:	Civil No. 92-1708 (AET)
v.	:	**MEMORANDUM AND ORDER**
JOHNSON & HIGGINS, Defendant.	:	

THOMPSON, District Judge

This matter comes before the Court on Plaintiff's motion for partial summary judgement and Defendant's motion for summary judgement pursuant to Fed.R.Civ.P. 56(c). For the reasons set forth below, the Court will deny Plaintiff's motion and grant Defendant's motion.

Background

This is an age discrimination case alleging violations of (1) the federal Age Discrimination in Employment Act of 1967 ("ADEA"); (2) the New Jersey Law Against Discrimination ("NJLAD"); and (3) the New York Human Rights Law ("NYHRL"); and that Defendant (4) breached its promises and representations; and (5) breached additional assurances and commitments; and (6) violated the New Jersey Business Corporation Act.

This Court filed an Order on August 4, 1993 denying both Plaintiff's and Defendant's motions for summary judgement.

This Court also remanded Plaintiff's motion to compel discovery to the Magistrate Judge for further proceedings consistent with the August 4, 1993 Order.

Magistrate Judge Hughes then conducted hearings and filed two Orders, one on August 17, 1993 and another on September 7, 1993. On appeal, this Court modified the Magistrate Judge's Orders in an opinion dated October 8, 1993. Plaintiff has now had ample time to take deposition testimony and has been provided with discovery material in accordance with this Court's Orders.

The Court adopts, but does not restate, the *"Background"* section of its August 4, 1993 Order.

Discussion

I. Standard of Review

A court may enter summary judgement if there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *Jersey Central Power & Light Co. v. Lacey Township,* 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied* 475 U.S. 1013 (1986). Not every issue of fact will be sufficient to defeat a motion for summary judgement; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). It is not enough to simply show that some "metaphysical" doubt exists as to the material facts. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Further, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 290 (1968)). The court must draw all reasonable inferences in

the opposing party's favor, and must accept that party's evidence when considering the merits of the summary judgement motion. *See Pollack v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir. 1986).

In deciding a motion for summary judgement, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. It is in this light that the Court must undertake an analysis of the facts of this case.

II. Plaintiff's Prima Facie Case

The facts of the present case do not present direct evidence of age discrimination. Nevertheless, the Supreme Court has held that a plaintiff is entitled to proceed with claims of discrimination within a frame work which entails shifting burdens of proof. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04, (1973). Initially, a plaintiff has the burden of establishing his prima facie case. *Id.* Then, the burden shifts to the Defendant to articulate legitimate, non-discriminatory reasons for its actions. *Id.* Finally, the Plaintiff is entitled to show that Defendant's stated reasons are a pretext. *Id.*

As summarized in this Court's August 4, 1993 Memorandum and Order, Plaintiff will establish a prima facie case of age discrimination if he shows that:

> (1) he belongs to a protected class;
> (2) he was qualified for the position;
> (3) he suffered adverse job action; and
> (4) he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination.

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir.) (citing *Maxfield v. Sinclair Int'l,* 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied,* 474 U.S. 1057 (1986)), *cert. dismissed,* 483 U.S. 1052 (1987). Once again Defendant has moved for

summary judgement arguing that Plaintiff has failed to meet his burden of establishing a prima facie case.

A. Plaintiff's Qualifications

To satisfy the second prong of the prima facie case, Plaintiff must show that he was qualified for the position from which he was terminated. Plaintiff argues that Defendant is estopped from disputing Mr. Sempier's qualifications because no evidence of Mr. Sempier's allegedly poor performance was produced during discovery.

Plaintiff's employment history is somewhat unique. Plaintiff's duties as Chief Administrative Officer were taken from him over a four year period until, in June of 1991, he had no remaining substantive responsibilities. Nevertheless, Plaintiff has not presented evidence that he was qualified to be a Johnson & Higgins' director, or that he was qualified to carry out the duties which were gradually taken from him.

Plaintiff relies primarily on two affidavits to prove that he was qualified to execute his duties. Plaintiff's own affidavit states that he had always done excellent work and that he had never been told that his performance was inadequate. The Court, however, may not afford Mr. Sempier's own opinion of his qualifications much weight. *See Billet v. CIGNA Corp.*, 940 F.2d 812 (3d Cir. 1991) ("However, [Plaintiff's] view of his performance is not at issue; what matters is the perception of the decision maker.").

The second affidavit upon which Plaintiff relies, that of Defendant's Chief Executive Officer, Mr. Robert Hatcher, indicates that Mr. Sempier's performance had, in Mr. Hatcher's opinion, always been satisfactory. However, Mr. Hatcher also indicates that Mr. Sempier's reputation among most board members was poor. (Hatcher Aff. at ¶¶ 9, 11, 12, 18.) Mr. Hatcher's deposition testimony reaffirms his affidavit and indicates that Mr. Sempier had been told of his poor

performance on several occasions. (Hatcher Dep. at pp. 10, 24, 31, 40, 42, 43, 44, 45, 50, 55-56, 58-59, 67, 70, 72, 110, 128, 141-42, 147, 153 and 158.) Moreover, Mr. Hatcher had reservations about Plaintiff's leadership and skills. He felt that Mr. Sempier had "an inability to get things done" and was better suited to project oriented tasks than management oriented tasks. (*Id.* at pp. 36, 42.) Mr. Hatcher also stated that Mr. Sempier's election to the board did not reflect a consensus among the directors that he was qualified, but rather resulted from Mr. Hatcher's influential suggestion that Mr. Sempier be given a directorship. (*Id.* at p. 141.) This careful analysis of Mr. Hatcher's testimony shows not only that Mr. Hatcher had doubts about Mr. Sempier's qualifications, but that Mr. Sempier's reputation was not that of a qualified and respected director or CAO.

Plaintiff also relies on two annual evaluations to prove the second prong of his prima facie case. In 1987 and 1988 Mr. Sempier's "Review of Goals" and "Dialogues" show that he was rated in the middle category entitled "What Was Expected". However, according to Plaintiff's supervisor:

> These forms represented the beginnings of an effort by the Board to establish a structure through which individual Directors could obtain feedback with respect to their performance from the Directors to whom their operations reported. The forms were not used by the Directors' salary and stock-allocation committees.

(Hecken Aff. at ¶ 13.) Thus, these forms do not represent formal evaluations.

Determining whether Mr. Sempier is qualified for a high-level executive position is difficult in light of the broad nature of his duties. Nevertheless, Plaintiff has failed to produce any evidence on which a jury could rely to return a verdict in his favor. Mr. Sempier has not explained how his training and

experience qualified him for a board position or to be Johnson & Higgins' CAO. Although it would be unusual for a corporation to place an unqualified individual in an executive position, it is not unimaginable. As mentioned above, there is undisputed testimony that Mr. Hatcher used his influence as Chief Executive Officer to obtain a directorship for Mr. Sempier who was generally thought to be unqualified for the position.

Therefore, the Court is doubtful that a reasonable jury could return a verdict in favor of Plaintiff.

B. An Inference of Age Discrimination

The fourth prong of the prima facie case requires a showing that Defendant was replaced by an individual sufficiently younger to permit an inference of age discrimination. The Court's August 4th Order held that unresolved factual issues prevented the Court from granting summary judgement at that time. After additional discovery and a thorough review of the record, the Court is concerned that Plaintiff has failed to adduce sufficient evidence upon which a reasonable jury could rely to return a verdict in his favor. *See Anderson, supra.*

In *Maxfield,* the Third Circuit concluded that an inference of age discrimination may arise even if the plaintiff was replaced by an individual within the protected class. *Maxfield,* 766 F.2d at 792 ("All [court's addressing the issue] have held that the replacement need not be younger than 40, the age at which ADEA protection begins."). A plaintiff need only prove replacement by a person whose age was sufficiently younger to permit an inference of discrimination. *Id.* In reaching its decision, the Third Circuit considered the following argument by Defendant Sinclair International:

> Sinclair's suggestion that if its construction of the statute were not accepted, "court's would be opening their doors to claims for discrimination under

> [the ADEA] by 45 year old employees replaced by 48 year olds," Brief for Appellant at 22, is frivolous. Moreover, we see little basis for any concern that replacement by a slightly younger employee will give rise to an ADEA claim, since proof of replacement by a younger person is not conclusive of discrimination but is merely one element in a set of circumstances that may give rise to an inference of discrimination. If the difference in ages of the two employees were insignificant, the district court would likely find that the evidence was insufficient to permit an inference of discrimination.

Id. at 793. Courts have found that age differences greater than five years are significant when both the terminated employee and the replacement are within the protected class. *See Healy v. New York Life Insurance Company,* 860 F.2d 1209, 1214 (3d Cir. 1988) (a nine year age difference is sufficient), *cert. denied,* 490 U.S. 1098 (1989); *Douglas v. Anderson,* 656 F.2d 528, 533 (9th Cir. 1981) (five year difference plus a showing of satisfactory job performance is sufficient); *Chipollini v. Spencer Gifts, Inc.,* 613 F. Supp. 1156, 1159 (D.N.J. 1985) (fifteen year difference is sufficient), *rev'd on other grounds,* 814 F.2d 893 (1987); *cf. Haimovitz v. United States Dep't of Justice,* 720 F. Supp. 516, 528-29 (W.D.Pa. 1989) (a thirteen year difference although giving rise to an inference is not a presumption which establishes proof by a preponderance of the evidence), *aff'd,* 902 F.2d 1560 (1990). In *Gray v. York Newspapers, Inc.,* the Third Circuit held that a one year age difference was insufficient to permit an inference of discrimination. 957 F.2d 1070, 1087 (3d Cir. 1992).

In the present case, Plaintiff's career with Defendant ended at the age of 60. Defendant concedes that Plaintiff was replaced by an individual who was four years his junior. (Brief in Support of Plaintiff's Motion for Partial Summary Judgement, June 25, 1993 at Page 39). When Plaintiff was initially

approached about retirement he was 58. Although certainly not decisive, the fact that those directors responsible for Plaintiff's "termination" all ranged in age from 52 to 59 is informative as is the fact that the board unanimously voted to accept Plaintiff's letter of resignation.[1] Moreover, Plaintiff was elected to serve as director in April of 1986 and again in May of 1989. The close proximity of Plaintiff's election to the board with the beginning of the termination negotiations in 1990, further detracts from any inference of age discrimination. *See Lowe v. J.B. Hunt Transport, Inc.*, 963 F.2d 173, 174 (8th Cir. 1992). In light of these factors, the Court doubts whether Plaintiff has met his burden of proving the fourth prong of the prima facie case.

III. Defendant's Articulated Business Reasons

Despite its reluctance to conclude that Plaintiff has made out a prima facie case, the Court will proceed to the next step of the *McDonnell* analysis: Defendant's articulated business reasons for Plaintiff's dismissal. Defendant argues that its legitimate business reasons for terminating Plaintiff were: (1) Plaintiff's poor performance, poor reputation and lack of credibility resulting in a gradual reduction in responsibilities and (2) a lack of sufficient responsibilities to warrant his remaining a director.

Defendant has submitted the affidavits of several senior directors which indicate the Plaintiff had lost credibility as well as the confidence of many board members. Specifically, Mr. Hatcher, who was Mr. Sempier's personal friend, repeatedly stated during his deposition that the board generally held Mr. Sempier in low regard. As noted above, Mr. Hatcher was

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[1] The Court notes that Plaintiff's counsel stated at oral argument on February 22, 1994, that there were Johnson & Higgins' directors older than Plaintiff at the time he was actually terminated in June of 1991.

also of the opinion that Mr. Sempier's election to the board in 1986 was the result of Mr. Hatcher's personal intervention. "Yes, but as I said, they [other Directors] were not voting their sentiments. They were voting because I asked them to [put Burt on the board], all right [sic]." (Hatcher Dep. at pp. 141-42). Mr. Hatcher further indicated that Mr. Sempier's 1989 reelection to the board similarly reflected Mr. Hatcher's influence rather than the board's satisfaction with Plaintiff's performance. (*Id.* at 152-53.)

Mr. Hecken was Mr. Sempier's direct supervisor from 1987 through Mr. Sempier's termination in 1991. Mr. Hecken states that he was dissatisfied with Mr. Sempier's performance in the MIS department and was doubtful that Mr. Sempier would ever be

> turned into an effective leader of the operations now reporting to him, and as 1988 unfolded that became ever more clear to me. For that reason, and because he had his position as CAO through the favor of Mr. Hatcher, I did not believe that rehearsing Mr. Sempier's specific performance deficiencies with him or with Mr. Hatcher would accomplish anything.

(*Id.* at ¶ 8.) Specifically, Mr. Hecken perceived that the costs incurred by the MIS department were too high given the quality of information provided to Defendant. Moreover, some of the software was "too far behind the state of the art." (*Id.* at ¶ 10.) Mr. Hatcher agreed that Mr. Sempier's performance in the MIS department was less than expected. (Hatcher Aff. at pp. 44-45). Therefore, Defendant determined that it would be best to replace Mr. Sempier and also to create the position of Chief Informations Officer. Mr. Sempier was considered for that position in 1988, but it was decided that he was not qualified and the position was offered to and accepted by Mr. Page in 1989. (Hatcher Aff. at ¶ 18.)

Prior to his appointment as CAO, Mr. Sempier was Defendant's CFO from 1984-1987. From 1986 until he left that post, Mr. Sempier reported to Mr. E. Eric Johnson a Johnson & Higgins director. Mr. Johnson was also familiar with Mr. Sempier's work for many years prior to 1986. Mr. Johnson was generally dissatisfied with Mr. Sempier's performance as CFO in 1985 and 1986. Moreover, an independent auditor found Mr. Sempier's division to be disorganized and performing poorly. (See Johnson Cert. ex. A.) Although Plaintiff's performance as CFO is not directly relevant to his 1991 termination, the uncontroverted testimony, that as CFO Plaintiff had not fulfilled his duties, sheds light on the issue of Plaintiff's general reputation and credibility.

Plaintiff argues that these general averments of poor performance and loss of credibility are not legitimate business reasons because they omit references to specific instances of below average performance. This argument fails for two reasons. First Defendant has presented evidence of specific skills which Plaintiff lacked. (*See* Part IV *infra,* p. 15.) More importantly, however, is the fact that Mr. Sempier was a high level manager. Rarely will there be specific incidents of such an individual's poor performance. Broad general evaluations, personality, credibility, confidence and overall performance are the more likely indicators of whether a manager in Plaintiff's position is successful. The record in this case is replete with statements and documents which show that Plaintiff was not a respected member of the Johnson & Higgins' board. Moreover, senior directors expressed reservations about electing Plaintiff to the board. (See Hatcher Aff. ex. C., Letter to Mr. Hatcher from Mr. Johnson stating that Mr. Sempier was not a good manager, did not have the support of his people, was not receptive to changes and suggestions, would not build an effective organization and should not be the CFO).

Mr. Gardner Mundy, Secretary of Defendant corporation stated in his certification that Mr. Sempier's salary and stock

allocations reflect the Director Compensation Committee's view that Mr. Sempier was a poor performer.

The above evidence supports Defendant's legitimate non-discriminatory reasons for having transferred Plaintiff's most significant duties to other individuals. The Court must now turn to Defendant's argument that the responsibilities which remained with Mr. Sempier in 1991 were insufficient to warrant his remaining a director. Mr. Hatcher summarized Defendant's policy regarding directorships:

> The prestige and influence associated with a Directorship at J&H, and the credibility of J&H's policy that Board seats are filled, and held, on a meritocratic basis, would be seriously compromised if Directors who were obviously making no significant contributions to the firm were allowed to occupy Board seats.

(Hatcher Aff. at ¶ 20.) By the end of 1989 Mr. Hatcher had concluded that Mr. Sempier should no longer remain on the board because his duties had been lessened significantly and there was nothing new for him to "take on." (Hatcher Aff. at ¶¶ 20-21 and Hatcher Dep. at pp. 49, 54, 57, 59.) Mr. Hatcher began the process of finding someone to take over Mr. Sempier's remaining duties, i.e., real estate, human resources and professional development. The 54 year old Mr. Carpenter impressed Mr. Hatcher primarily because he might prove useful to the company "in the years ahead." Defendant hired Mr. Carpenter to take over Mr. Sempier's human resources and professional development responsibilities. Mr. Carpenter's salary was greater than Mr. Sempier's. Eventually, Mr. Carpenter was also given Mr. Sempier's real estate duties. Hence, Plaintiff was left with virtually nothing when his resignation was accepted by the board in June of 1991. In light of Defendant's undisputed evidence regarding its policy on directorships, the Court is satisfied that Defendant has

articulated legitimate, non-discriminatory business reasons for terminating Mr. Sempier.

IV. Defendant's Articulated Reasons Are Not Pretextual

Once a defendant has articulated non-discriminatory reasons for its actions, the burden shifts to the plaintiff to present evidence which " 'casts doubt on his employer's contention that there was a legitimate business reason for [terminating him.]' " *Billet,* 940 F.2d at 825 (quoting *Healy,* 860 F.2d at 1220). "Without some evidence to cast this doubt, this court will not interfere in an otherwise valid management decision." *Id.* at 828. The mere fact that a plaintiff disagrees with his employer's evaluation is insufficient to prove pretext. *Id.* at 825 (citations omitted). However, a plaintiff must not only cast doubt on the defendant's proffered non-discriminatory reasons, but he must also show that discrimination was the actual reason for the termination. *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742, 2752 (1993).

In the present case, Plaintiff submits the following as evidence of pretext: (1) his own certification; (2) the deposition testimony and certification of Robert V. Hatcher and (3) "evaluation" forms for the years 1987 and 1988. Plaintiff also contends that Defendant's refusal to comply with this Court's discovery orders has made it impossible to dispute Defendant's contentions of poor performance.

The Court is satisfied that Defendant has complied with discovery orders issued by this Court and by Magistrate Judge Hughes. As noted above, the nature of Plaintiff's position and the structure of Defendant corporation explain the lack of specific instances of poor performance. However, Defendant has presented evidence of Plaintiff's inferior reputation among senior board members. Defendant has also identified specific skills which Plaintiff lacked: leadership ability, knowledge of high-technological areas, ability to work well with others, organizational skills and ability to delegate. At oral

argument Defendant stated that senior board members have been available for depositions, and that in fact depositions had been scheduled, but Plaintiff opted not to go forward. Plaintiff did not address this issue. Therefore, the Court concludes that Plaintiff was given ample opportunity to participate in discovery and to uncover evidence which would create genuine issues of material fact.

The certifications and depositions relied on by Plaintiff are equally unpersuasive in casting doubt on his employer's legitimate non-discriminatory reasons. Plaintiff's own opinion of his work performance is not at issue in this case. *See Healy,* 860 F.2d at 1220. Mr. Hatcher, although certain that Mr. Sempier had skills and qualities which were beneficial to Defendant, knew that Mr. Sempier was not well regarded by other board members. Mr. Hatcher was of the opinion that his personal powers of persuasion, not Mr. Sempier's qualifications and reputation, were the cause of Mr. Sempier's election to the board. Finally, as noted above, Mr. Hatcher acknowledged that Mr. Sempier was not fulfilling his obligations in the MIS division and that once these duties were assigned to Mr. Page, Plaintiff did not have sufficient responsibilities to continue as a director. Thus, Plaintiff's contention is unfounded that affidavits from "both sides" of the case show that Mr. Sempier was qualified and performing well.

The two sets of evaluations which Plaintiff has put before the Court reveal that in 1988 and 1989 Mr. Hecken, Plaintiff's supervisor indicated that he was performing at an average level. However, Defendant has presented uncontroverted affidavit testimony by Mr. Hecken that these evaluations were not designed to accurately record a director's performance. The evaluations were a first attempt by Defendant to open the lines of communication between lower level directors and the senior members of the board to whom they reported. Viewed in this light, they are of little value in determining Plaintiff's true level of performance.

The final piece of evidence which Plaintiff relies on is Defendant's alleged policy of targeting older individuals for early retirement. However, the existence of a policy which indicates that it is preferable to retire a poor performer or redundant worker rather than fire him or her, does not imply age discrimination. Moreover, Plaintiff has not presented evidence that the dialogue regarding the possible implementation of such a plan was ever formally adopted.

In sum, Plaintiff has not provided the Court with evidence which casts doubt on Defendant's articulated reasons for removing Mr. Sempier from the board. Moreover, none of the evidence, including the memos chronicling a dialogue about a potential early retirement program, remotely suggests that age was the actual cause for Plaintiff's or anyone else's termination. *See Hicks, supra.* In fact, Plaintiff stated at his deposition that he believes age was the reason behind his termination because, "There weren't any real reasons that I felt were offered up to me, other than some discussion about why I might consider leaving." (Sempier Dep. pp. 9-15.) This sentiment was echoed by Plaintiff's counsel at oral argument on February 22, 1994 when he stated that Plaintiff's case was premised upon Defendant's failure to present any evidence. Nothing in any of the papers submitted suggests that age was the reason for Plaintiff's termination. Plaintiff's lack of respect among fellow directors and his poor performance in certain areas remains uncontradicted. The Court therefore concludes that Defendant was within its rights when it terminated Plaintiff, "particularly [because] the decision involve[d] subjective factors ... that the company deems essential to high level executive positions." *Healy,* 860 F.2d at 1220.

III. Plaintiff's State Law Claims

This Court initially exercised its pendent or supplemental jurisdiction over Plaintiff's state claims as they arose out of the same nucleus of operative facts as Plaintiff's federal

claim. *See United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). The Second and Third Counts of Plaintiff's complaint are state law claims based on New York and New Jersey laws prohibiting age discrimination.[2] The analysis under these laws mirrors the above analysis of Plaintiff's federal claim. Therefore, the Court will grant summary judgement in favor of Defendant on Counts Two and Three of Plaintiff's complaint.

The only remaining issues before the Court, counts Four, Five and Six of Plaintiff's complaint, arise out of state law. Although the parties have spent a significant amount of time in federal court adjudicating this case, a final pre-trial conference has not yet occurred, and Plaintiff is dissatisfied with the amount of discovery thus far. The case does not appear ready for trial.

Balancing this action's procedural posture with New Jersey's strong interest in adjudicating its own claims, this Court declines to exercise its supplemental jurisdiction. *Lentino v. Fringe Employee Plans, Inc.,* 611 F.2d 474 (3d Cir. 1979). Plaintiff's state claims will be dismissed.

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[2] New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* and New York Executive Law § 296 (McKinney 1982).

Conclusion

It is therefore on this 9th day of March 1994

ORDERED that Plaintiff's motion for partial summary judgement be and hereby is **denied;** and it is further

ORDERED that Defendant's motion for summary judgement be and hereby is **granted;** and it is further

ORDERED that counts Four through Six of Plaintiff's complaint be and hereby are **dismissed** without prejudice to Plaintiff's right to proceed in the state courts and the case is hereby closed.

/s/ Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.

D. Memorandum and Order of the District Court Initially Denying Summary Judgment

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BURT N. SEMPIER, Plaintiff,	:	Civil No. 92-1708 (AET)
v.	:	**MEMORANDUM AND ORDER**
JOHNSON & HIGGINS, Defendant.	:	

THOMPSON, District Judge.

This matter is before the Court on (1) Defendant Johnson & Higgins' ("J&H") motion for summary judgment, (2) Plaintiff Burt N. Sempier's motion for partial summary judgment, and (3) Plaintiff's appeal of the Magistrate Judge's Letter Opinion, entered on May 24, 1993, denying his motion to compel discovery.

Background

J&H is an insurance brokerage and employee benefits consulting firm incorporated in New Jersey and headquartered in New York City. (Hatcher Aff. ¶¶ 5-6.) The firm has approximately 150 subsidiaries, and in 1991, J&H employed over 900 people. (*Id.* ¶ 5.) During the relevant time period, all of J&H's common stock was owned by its Board of Directors ("the Board") which ranged between 31 and 42 members. (*Id.* ¶ 6.) Mr. Sempier, a New Jersey resident, joined J&H in 1968 as its Comptroller. (*Id.* ¶ 7.) In 1971, he was named Treasurer of J&H and worked in that capacity for more than ten years.

In 1982, Mr. Robert V. Hatcher, Jr., J&H's Chairman and CEO, gave Mr. Sempier responsibility for the negotiation of new lease arrangements for J&H. (*Id.* ¶¶ 7, 10.) In the interim, Mr. Frederic K. Howard assumed Mr. Sempier's day-to-day duties as Treasurer. (*Id.* ¶ 10.)

In 1984, following completion of his lease negotiation duties, Mr. Sempier became J&H's Chief Financial Officer ("CFO"), and Mr. Howard became J&H's Treasurer. (*Id.* ¶ 11.) Mr. Hatcher attests that several Directors had doubts about naming Mr. Sempier to the CFO position, but that they deferred to his judgment as Chairman and CEO. (*Id.*) In 1986, the Board elected Mr. Sempier to be a Director;[1] according to Mr. Hatcher, he personally persuaded the Board to take this action. (Hatcher Aff. ¶ 12.) Like every other Director, Mr. Sempier tendered a resignation letter at the time of his election which would become effective upon a two-thirds vote of the full Board. (*Id.* ¶ 13(e).) In 1987, another person was named CFO, and Mr. Sempier was named J&H's Chief Administrative Officer ("CAO") with responsibility for Management Information Systems ("MIS"), Human Resources, Professional Development, and Real Estate and Facilities. (*Id.* ¶ 17.) He remained at this position until his separation from J&H in June 1991. Mr. Hatcher asserts that the change was triggered by dissatisfaction on the part of certain Directors with Mr. Sempier's performance as CFO. (*Id.* ¶¶ 14, 17; *see also id.* Ex. C.)

By mid-1988, the Board decided to make MIS a standalone department, and at the end of 1989, the MIS area was reassigned to Mr. Alan G. Page who was named Chief Information Officer. (*Id.* ¶¶ 18-19.) In early 1990, J&H hired Mr. Thomas E. Carpenter to be responsible for Human Resources

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[1] Plaintiff was elected to serve as a Director on April 23, 1986 through 1989; he was reelected to serve as a Director on May 17, 1989 through 1993. (*See* Pl.'s Br. in Supp. at 12.)

and Professional Development, (*id.* ¶ 21), and in April 1990, Mr. Hatcher raised the issue of retirement with Mr. Sempier. (*Id.* ¶ 22.) Although Mr. Sempier retained the CAO title, his responsibilities were limited to Real Estate and Facilities, and according to Mr. Hatcher, these functions alone did not justify Mr. Sempier's continuance as a Director. (*Id.* ¶ 20.) Moreover, Mr. Hatcher attests that Mr. Sempier "lacked credibility with the incoming Chairman, Mr. Olsen, and the other senior managers, and that there was really no work for him to do." (*Id.* ¶ 22.)

Mr. Hatcher told Mr. Sempier that J&H would provide him with various enhancements to his existing retirement package, and subsequently sent two memoranda outlining special retirement terms. (*Id.* ¶ 24; *see also id.* Exs. H, J.) Mr. Sempier, however, felt that these proposals did not reflect Mr. Hatcher's oral representations, and he expressed his lack of interest in retirement. Thereafter, Mr. Hatcher retired, and Mr. David A. Olsen, J&H's new Chairman and CEO, wrote another memorandum to Mr. Sempier regarding retirement terms. (*Id.* ¶ 25; *see also id.* Ex. K.) Mr. Sempier advised Mr. Olsen that he was not interested in retiring, and in January 1991, Mr. Sempier retained counsel. Between January 1991 and April 1991, Mr. Gardner M. Mundy, J&H's Secretary and General Counsel, engaged in retirement discussions with Mr. Sempier; however, Mr. Sempier, in consultation with his counsel, rejected Mr. Mundy's terms for early retirement. (Mundy Aff. ¶ 7.) Ultimately, in June 1991, Mr. Mundy polled J&H's Directors who voted unanimously to accept Mr. Sempier's resignation letter. At the next Board meeting in July 1991, the Board adopted a resolution ratifying their earlier vote. (*Id.* ¶ 8.)

Plaintiff, however, contends that in May 1989, J&H began to implement its corporate program to reduce the size of its elderly workforce through an early retirement plan. (*See* Pl.'s Apps. B, D.) The plan entailed identifying "redundant" or

"poorly performing" employees who were 55 years of age and older, and thus eligible for early retirement. (*See id.*) By July 1989, 86 employees had been identified for termination, of which 70% were 55 years or older. (*Id.* App. D.) By December 1989, 92 employees had been identified. (*Id.* App. E.) The plan contemplated a "pull/push" approach whereby J&H could attempt to elicit voluntary resignation or retirement, or could simply downsize its workforce and eliminate redundant positions. (*See id.* App. D.) Mr. Sempier asserts that he was involuntarily terminated under the guise of the Board's having accepted his letter of resignation. (*See id.* App. J.)

Following exhaustion of administrative remedies before the United States Equal Employment Opportunity Commission ("EEOC"), Plaintiff filed suit in this Court on April 16, 1992. Plaintiff alleges that Defendant violated (1) the federal Age Discrimination in Employment Act of 1967, (2) the New Jersey Law Against Discrimination, and (3) the New York Human Rights Law, and (4) breached its promises and representations, (5) breached additional assurances and commitments, and (6) violated the New Jersey Business Corporation Act.

Discussion

The Court may grant summary judgment under Federal Rule of Civil Procedure 56(c) when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "[T]he inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)). However, when the opposing party bears the burden of proof, it must designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.,* 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). "Only disputes over facts that might affect the outcome of the suit under the

governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To establish a prima facie case of age discrimination, Plaintiff must establish that:

> (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination.

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir.) (citing *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986)), *cert. dismissed*, 483 U.S. 1052 (1987). Defendant argues that Plaintiff has failed to prove by a preponderance of the evidence that he was qualified and that his replacement was sufficiently younger to permit an inference of discrimination. In the alternative, Defendant contends that it has articulated a legitimate non-discriminatory reason for its actions.

"The burden of establishing a prima facie case of disparate treatment is not onerous," *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), and "[g]enerally, the focus of age discrimination cases centers [on] the defendant's articulated legitimate business reasons and the plaintiff's evidence of pretext." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 n.1 (3d Cir. 1988), *cert. denied*, 490 U.S> 1098 (1989). The Court finds that Plaintiff's history of employment and promotions as well as his and Mr. Hatcher's affidavits create genuine issues of material fact with respect to the second prong of his prima facie case and preclude summary judgment based on Plaintiff's qualifications.

As for legitimate business reasons, although the ourt recognizes that an employee's assessment of his own

performance is secondary to that of his employer, *see Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991), Defendant's underlying reasons for seeking Plaintiff's resignation are unclear. Defendant maintains that Plaintiff's job responsibilities had been given to other people, his contribution to J&H no longer warranted his continued employment, and he had lost the respect of his colleagues. These assertions, however, beg the question. Why were Plaintiff's job responsibilities reassigned, and how had he lost his colleagues' respect? In what way was Plaintiff's job performance deficient, or for what reasons did Defendant decide that Plaintiff was unable to satisfactorily complete the duties that he once had? Since these questions remain unanswered, summary judgment cannot be granted on this basis.

With respect to replacement by a younger person, Defendant argues that Plaintiff's replacement by an employee who was only four years younger and who was given a higher salary cannot support an inference of age discrimination. *See Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1087 (3d Cir. 1992). Plaintiff, however, contests whether his replacement was a more expensive employee, and maintains that he has established a prima facie case. The Court concludes that whether the age of Plaintiff's replacement can support an inference of discrimination depends on unresolved factual issues, and denies summary judgment on this ground. *See Franz v. Raymond Eisenhardt & Sons, Inc.*, 732 F. Supp. 521, 526 (D.N.J. 1990) ("evidentiary value of the age of the replacement will depend on the other evidence of discrimination").

Finally, Defendant maintains that Plaintiff failed to file a timely charge of discrimination with the EEOC and that this suit is barred. In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Supreme Court instructed that the determination of timeliness requires a court "to identify precisely the 'unlawful employment practice' of which he [plaintiff]

complains." *Id.* at 257. The Court agrees with Plaintiff that the polling of J&H's Directors in June 1991 regarding acceptance of his resignation letter constituted the allegedly unlawful employment practice. *See id.* at 262. Therefore, summary judgment on this ground is denied.

Plaintiff also moves for summary judgment on his age discrimination claims. Plaintiff argues that Defendant cannot rebut his prima facie case by "clearly set[ting] forth, through the introduction of admissible evidence, the reasons for the [negative job action]." *Burdine,* 450 U.S. at 255. As discussed above, the Court finds that Defendant has merely described Plaintiff's circumstances as opposed to articulating the reasons for its actions. However, pursuant to the Magistrate Judge's Letter Opinion, entered on May 24, 1993, Defendant was not required to produce additional discovery. Thus, Plaintiff's motion for summary judgment dovetails with his appeal of the May 24, 1993 Letter Opinion.

In considering an appeal from a Magistrate Judge's determination, a District Judge "may affirm, reverse, modify, or remand the magistrate's judgment." 28 U.S.C.A. § 636(c)(4) (West Supp. 1992). With respect to nondispositive matters, this Court shall "set aside any portion of the Magistrate's order found to be clearly erroneous or contrary to law." N.J. Gen. R. 40(D)(4)(a) (1992); *see also* 28 U.S.C.A. § 636(b)(1)(A) (West Supp. 1992); Fed. R. Civ. P. 72(a). Although there may be evidence to support a particular finding, it is clearly erroneous if the reviewing court "is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

Having determined that Defendant's purported reasons for seeking Plaintiff's resignation are insufficient, it is the opinion of the Court that further discovery regarding Plaintiff's performance is warranted. Therefore, the Court must vacate the Magistrate Judge's Letter Opinion and remand Plaintiff's

motion to compel responses to interrogatories and requests for production of documents for further proceedings consistent with this opinion. Finally, the Court finds that there are remaining factual questions regarding the fourth, fifth, and sixth counts of Plaintiff's Complaint, and denies the parties' motions for summary judgment on these counts.

Therefore, it is on this 4th day of August 1993;

ORDERED that Defendant's motion for summary judgment be and hereby is denied, and it is further;

ORDERED that Plaintiff's motion for partial summary judgment be and hereby is denied, and it is further;

ORDERED that Plaintiff's appeal of the Magistrate Judge's Letter Opinion, entered on May 24, 1993, be and hereby is granted, that this Letter Opinion be and hereby is vacated, and that Plaintiff's motion to compel be and hereby is remanded for further proceedings consistent with this opinion.

/s/ Anne E. Thompson

ANNE E. THOMPSON, U.S.D.J.

E. Order of the District Court Denying Motion for Reconsideration of Initial Denial of Summary Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BURT M. SEMPIER, Plaintiff, v. JOHNSON & HIGGINS, Defendant.	WILLIAM T. WALSH, CLERK Civil No. 92-1708 (AET) **ORDER**

This matter is before the Court on Defendant Johnson & Higgins' motion for reconsideration of the Court's August 4, 1993 Order. Appearing before the Court on September 30, 1993 were Riker, Danzig, Scherer, Hylsnf [sic] & Peretti, Esqs., by Mr. Charles F. Waskevich, Esq. on behalf of Plaintiff; and the Office of Michael B. Miller, Esq., by Mr. John F. Cannon Esq. on behalf of Defendant. After hearing oral argument, and after careful review of the Court's Order of August 4, 1993, the Court denies Defendant's motion.

Defendant's arguments do not alter this Court's view of the law as it relates to the facts of the present case. Both cases cited by Defendant, *United Airlines v. Evans*, 431 U.S. 553 (1977) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), involve allegations of continuous, ongoing violations of Title VII. Plaintiff's attorney, Mr. Waskevich, repeatedly stated during oral argument that the "discriminatory act was the board's polling, the vote of the board to terminate the employment and directorship of Mr. Sempier." Transcript of Thursday, September 30, 1993 at 13. Since Plaintiff alleges a single act of discrimination which falls well within the statute

of limitations, the Court finds no reason to disturb its Order of August 4, 1993.

Plaintiff has stated that the events which pre-date the alleged discriminatory act are not at issue in this case. Transcript of Thursday September 30, 1993 at 13. Nevertheless they may be used as evidence to support or oppose Plaintiff's claim of discrimination.

It is therefore on this 8th day of October 1993,

ORDERED that Defendants motion for reconsideration be and hereby is denied.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

F. Federal Rules of Civil Procedure Rules 50(a) and 56(b), (c) and (e)

Fed. R. Civ. P. 50(a) provides:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

* * *

Fed. R. Civ. P. 56 provides:

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

G. Age Discrimination in Employment Act

§§ 623(a)(1) and 626(d)(2)

29 U.S.C. §§ 623(a)(1) and 626(d)(2) provide:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

§ 626. Recordkeeping, investigation, and enforcement

* * *

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed --

(1) . . .

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Supreme Court, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

(2)

No. 94-1692

In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES F. WASKEVICH, JR.
Counsel of Record
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that respondent had produced sufficient evidence of discriminatory intent and pretext to defeat petitioner's motion for summary judgment?

LIST OF PARTIES

Petitioner, Johnson & Higgins, is a corporation incorporated under the laws of the State of New Jersey and is engaged in the insurance brokerage and employee benefits consulting businesses.

Respondent, Burt N. Sempier, is a resident of North Caldwell, New Jersey, and was an employee, officer and director of petitioner until respondent's employment and directorship with petitioner was wrongfully terminated by petitioner on June 11, 1991.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 12

REASONS FOR DENYING THE WRIT 13

THE COURT OF APPEALS DID NOT HOLD, AS PETITIONER CONTENDS, THAT AN EMPLOYEE ALWAYS SURVIVES SUMMARY JUDGMENT WHENEVER THE EMPLOYEE PRESENTS ANY EVIDENCE OF PRETEXT ON A MOTION FOR SUMMARY JUDGMENT 13

A. The Court of Appeals Correctly Held, Consistent With The Decision Of This Court in *Hicks*, That A Plaintiff Who Has Made Out A *Prima Facie* Case Of Discrimination May Defeat A Motion For Summary Judgment And Proceed To Trial By Producing Either Evidence Of Pretext Or Evidence Of Discrimination Sufficient To Permit The Trier Of Fact To Infer Discrimination And Find For The Plaintiff 14

B. The Court Of Appeals' Holding Neither Conflicts With The Decisions Of This Court Nor Other Courts Of Appeal So As To Present A Justiciable Issue Requiring Resolution By This Court 15

C. Petitioner's Dissatisfaction With The Court Of Appeals' Analysis Of The Evidence Does Not Present A Substantial Issue Appropriate For Resolution By This Court 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. Liberty Lobby, 477 U.S. 242 (1986).....14, 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).....14, 18

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742 (1993).....14, 15, 16

No. 94-1692

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JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Burt N. Sempier, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Johnson & Higgins.

STATEMENT OF THE CASE

A. Statement Of Facts

- **Respondent's Exemplary Employment With Petitioner**

Respondent, Burt N. Sempier, commenced employment with petitioner in petitioner's New York City office on September 1, 1968. (Ja 300.)[1] Throughout his employment with petitioner, respondent performed all duties assigned to him with unquestioned dedication and in an exemplary manner. (*Id.*) During his employment with petitioner, respondent was never advised that his performance was anything other than entirely satisfactory. (*Id.*; Ja 306; Ja 258; Ja 281.)

- **Respondent's Promotions**

From time to time during his employment with petitioner, respondent was promoted and received increases in his compensation. (Ja 301; Ja 20.) On May 4, 1987, effective May 20, 1987, respondent was promoted to the position of Chief Administrative Officer ("CAO") of petitioner. (Ja 301; Ja 20.) Respondent remained as petitioner's CAO until June 11, 1991 when respondent's employment was terminated on account of respondent's refusal to "voluntarily" retire from his employment and directorship with petitioner. (Ja 305-6.)

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[1] "Ja ___" refers to the Joint Appendix filed in the court of appeals. References to the Appendix to the Petition are cited as "___a".

- **Respondent's Election and Reelection To Petitioner's Board Of Directors**

Petitioner's business and affairs are managed by a classified Board of Directors which consists of four classes of directors, each class of directors consisting of approximately one fourth of the entire Board. (Ja 628-9; Ja 848.) The term of office of the directors in each director class is for four years, and until their successors have been elected and qualified. (Ja 628-9.) Consecutively, the term of office of one of the four classes of directors expires each year. (*Id.*) Petitioner's Certificate of Incorporation does not make any provision for the removal of directors and, in particular, does not provide for the removal of any director without cause. (*Id.*)

On April 23, 1986 (effective April 1, 1986), respondent was duly elected by petitioner to serve as a director of petitioner through 1989, and until his successor was elected and qualified. (Ja 301; Ja 20-21.) On May 17, 1989, respondent was reelected to serve as a director of petitioner through December 1993, and until his successor was elected and qualified. (*Id.*)

- **Petitioner's "Pull/Push" Coercive Retirement Program**

In May of 1989, petitioner, through its chief executive officer, Robert V. Hatcher, Jr. ("Hatcher"), proceeded with petitioner's corporate program to reduce the size of its elderly workforce. (Ja 636.) The program began with a directive to senior managers by Hatcher, captioned as

petitioner's "Prospective Early Retirement Program", for the identification of "redundant" or "poorly performing" employees *who were coincidentally eligible for early retirement* (i.e., employees 55 years of age and older) for termination of their employment. (Ja 636 and 637; Ja 810a.) In responding to the Hatcher directive, petitioner's senior managers identified elderly employees who met Hatcher's criteria. (Ja 638-640.) "Redundant" or "poor performers" *who were coincidentally young* were not targeted. (*Id.*) By July 24, 1989, 86 employees had been identified for termination under petitioner's "Prospective Early Retirement Program", of which 70% were 55 years or older. (Ja 637.) By December 5, 1989, this number stood at 92. (Ja 641-2.)

Petitioner's Early Retirement Program utilized, by petitioner's own admission, a "pull/push" approach of terminating the employment of the "early retirement candidates". (Ja 637.) The "pull" approach consisted of initially offering the targeted employee an "incentive" in order to obtain the employee's voluntary decision to terminate his/her employment. (*Id.*) For the employee refusing to "voluntarily" retire, the "push" approach entailed the involuntary termination of the employee's employment wherein the employee's discharge was characterized " . . . as a downsizing with the identification of redundant positions on the basis of business activity needs". (*Id.*) The expressed purpose of the (mis)characterization of the employee's involuntary discharge was to specifically avoid any controversy as to the employees' (alleged) poor performance. (*Id.*)

- **Petitioner's Retirement "Proposals" And Respondent's Refusals to Retire**

On April 19, 1990, Hatcher met with respondent and advised respondent that a committee of unnamed senior managers of petitioner had decided that respondent should retire from his employment and directorship with petitioner. (Ja 301-2; Ja 800-801.) Hatcher explained to respondent that respondent had "lost credibility" with unnamed senior managers of petitioner, but Hatcher further explained that he could not specifically explain the so-called "lost credibility" other than to state that he did not share that (the unnamed senior managers') view, i.e., respondent had not "lost credibility" with Hatcher. (Ja 301-2; Ja 797.)

Respondent advised Hatcher that he had no intention of retiring his employment and directorship with petitioner and, instead, intended to continue in petitioner's employ through at least the conclusion of his current term as a director of petitioner – through December of 1993. (Ja 302; Ja 802; Ja 810.) Hatcher advised respondent that he should seriously consider the company's retirement offer because the unnamed senior managers "would let (respondent) rot, would cut (respondent's) balls off and otherwise would make it unpleasant for (respondent) to stay". (Ja 302.) Hatcher further advised respondent that under the financial terms of the company's retirement offer, respondent would not be hurt financially, and that if respondent retired, he would continue to receive annual compensation of $204,000 - $205,000 through December 1993, and respondent's post-retirement pension and other entitlements would remain as if he had

retired at the end of December, 1993. (*Id.*; Ja 803.) Hatcher advised respondent that he would provide respondent with a formal written proposal. (Ja 302.)

At the time Hatcher approached respondent, Hatcher was aware of petitioner's "Guidelines For Early Retirement". (Ja 811-812; Ja 665-666.) Those guidelines provided, *inter alia*,

> "Early retirement offers must be approved in all instances by the Corporate Human Resources Department and the Personnel & Compensation Committee. The law prohibits the termination of any employee because of age . . . . *If it can be demonstrated that an employee was coerced or otherwise intimidated into retiring, we could be charged with age discrimination.* This could be so, for example, if an employee accepted early retirement and it was later determined that the employee had not been given sufficient time to consider the offer *or otherwise had been placed under such pressure* that a reasonable person would feel compelled to resign." (emphasis added) (Ja 665.)

In September, 1990, respondent first received the written early retirement proposal from Hatcher. (Ja 302; Ja 643-645; Ja 804.) That proposal did not reflect the representations that Hatcher had made to respondent on April 19, 1990. (Ja 302; Ja 809.) Respondent advised Hatcher again in September that he had no interest in retiring from his employment and directorship with Johnson & Higgins. (Ja 302; Ja 810.)

On December 28, 1990, respondent received another written early retirement offer (dated December 10, 1990) from petitioner. (Ja 302-3; Ja 646-648; Ja 808.) The December 1990 early retirement proposal was slightly different

than the September, 1990 proposal to respondent, however, the financial terms offered to respondent were neither agreeable nor consistent with the representations that Hatcher had made to respondent on April 19, 1990. (Ja 303.) Respondent again advised Hatcher on December 28, 1990 that he had no interest in retiring from his employment and directorship with petitioner. (Ja 303; Ja 810.)

On January 7, 1991, respondent received a memorandum dated January 4, 1991 from David Olsen ("Olsen"), who had succeeded Hatcher and assumed the position of chief executive officer of petitioner on January 1, 1991. (Ja 303; Ja 649.) Olsen's memorandum renewed petitioner's early retirement offer with some proclaimed modifications. (Ja 303.) Respondent advised Olsen that he was not interested in retiring from his employment with petitioner. (Ja 303.)

In January of 1991, respondent retained counsel to represent him regarding the matters set forth above. (Ja 303.) During the balance of January and throughout February and March of 1991, Gardner M. Mundy ("Mundy"), a director, senior vice-president and secretary of Johnson & Higgins, and also an attorney, continued to present modified proposals to respondent that he retire his employment and directorship with petitioner, however, respondent found none of Mundy's proposals to be acceptable to him. (Ja 303.)

On February 20, 1991, respondent's attorney met with Mundy to discuss petitioner's efforts to retire respondent from his employment and directorship with petitioner and, in particular, to determine whether or not

petitioner was contending that respondent's work performance was poor. (Ja 304.) Mundy refused to address the subject of respondent's work performance. (*Id.*; Ja 254; Ja 258; Ja 281.)

- **Respondent's Suspension**

At the end of March, Mundy informed respondent that respondent had to make a decision on Mundy's last modified retirement proposal. (Ja 304.) Accordingly, respondent met with Olsen on March 27, 1991 and advised Olsen that Mundy's last early retirement offer was unacceptable, and suggested that Mundy, an attorney, should confer with respondent's counsel since petitioner was continuing to insist on respondent's early retirement. (*Id.*; Ja 650.) Olsen flew into a rage and told respondent that since respondent had hired an attorney, he could not come to work anymore. (Ja 304; Ja 80-1.) Olsen told respondent to immediately leave the company offices, and go home "on vacation". (*Id.*) Respondent protested but complied with Olsen's directive. (*Id.*)

- **Petitioner "Tightens The Screws"**

On or about April 10, 1991, Mundy called respondent at his home in New Jersey and sought a meeting with respondent to continue discussions regarding respondent's early retirement. (*Id.*) Respondent and Mundy met at the Yale Club in New York City on April 12, 1991 at Mundy's request, whereupon Mundy presented respondent with yet another modified early retirement proposal. (*Id.*) On April 14, 1991, respondent told Mundy that his proposal was unacceptable. (*Id.*) On April 15, 1991,

Mundy invited respondent to return to work and, accordingly, respondent returned to his employment with petitioner on April 15, 1991. (*Id.*)

Upon respondent's return to work, petitioner continued its effort to bring about respondent's early retirement from petitioner. Petitioner requested Hatcher, although now retired himself, to contact respondent and press the issue of respondent's early retirement from petitioner. Hatcher contacted respondent in late April 1991 and requested a personal meeting with respondent, but respondent decided not to personally meet with Hatcher. (Ja 304-5.) Instead, Hatcher conversed with respondent by telephone, wherein Hatcher told respondent with respect to Mundy's last early retirement proposal that respondent should "take the deal as it is offered now – it is not going to get any better". (*Id.*; Ja 651.) Hatcher also told respondent that respondent "had no choice and that pretending there are other options is simply prolonging a process which is becoming increasingly unpleasant for everyone". (Ja 651.) Hatcher added that "You can't keep pushing the firm and somehow remain its best friend". (*Id.*) Notwithstanding the harsh message presented to him by Hatcher, respondent told Hatcher that under the terms presented to him, respondent was simply not prepared to retire. (Ja 305.) On April 30, 1991, because of respondent's refusal to accede to Hatcher's request that he retire, petitioner, working with Attorney John Cannon of Sullivan & Cromwell *contrary to its own "Guidelines For Early Retirement"* (Ja 665-6), decided to "tighten the screws" on respondent in its efforts to pressure respondent's early retirement. (Ja 651.)

- **Petitioner's "Retirement Ultimatum"**

On May 28, 1991, Mundy presented respondent with petitioner's "Final *Severance* Proposal". (emphasis added.) (Ja 305; Ja 652-4.) Mundy informed respondent that he had until June 7, 1991 to consider that "proposal", that there would be no further discussion and that if respondent refused to retire from his employment with petitioner, petitioner would involuntarily terminate respondent's employment and directorship with petitioner by "accepting respondent's letter of resignation".[2] (Ja 305; Ja 655.)

- **Respondent's Refusal To Retire And The Termination Of Respondent's Employment**

Respondent advised petitioner on June 7, 1991 that he would not voluntarily retire from his employment and directorship with petitioner. (Ja 261.) Accordingly, on June 11, 1991, petitioner involuntarily terminated the employment and directorship of respondent under the guise of having "accepted respondent's letter of resignation". (Ja 305-6.)

At no time did petitioner conduct a proper and duly noticed meeting of its shareholders prior to or for the purpose of removing respondent as a director and employee during which respondent could have addressed the reasons for his discharge. Instead, Mundy allegedly telephoned petitioner's directors, advised them

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[2] Because he was directed to do so, respondent had tendered an open-ended letter of resignation to petitioner on April 1, 1986 at the time he became a director. (Ja 389.)

that respondent's "performance has not justified his continuance as a Director", and obtained their "consent" for petitioner to "accept" respondent's "resignation", effective June 30, 1991. (Ja 261; Ja 305-6; Ja 718.) Other than his refusal to "voluntarily" retire from his directorship and employment with petitioner, respondent was never informed of any cause or reason for the termination of his directorship and employment with petitioner, particularly any reason involving his performance, and was not presented with any opportunity to address with his colleagues his involuntary discharge and removal as a director. (Ja 306.)

Subsequently, following the exhaustion of his administrative remedies before the United States Equal Employment Opportunity Commission ("EEOC") (Ja 490-496), respondent commenced suit against petitioner in the United States District Court for the District of New Jersey.[3] In responding to respondent's allegation that the termination of his directorship and employment was wrongful and unlawful, petitioner averred that it terminated respondent's employment because " . . . the Directors of petitioner who constituted the senior management of petitioner decided that respondent's performance did

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[3] As a result of respondent's charge of discrimination against petitioner filed with the EEOC, the EEOC found cause to proceed against petitioner and *also* commenced a civil action against petitioner which alleges, *inter alia*, that petitioner maintains an unlawful pattern and practice of terminating the employment of its elder directors on account of their ages. (Ja 657-661.) That action, *EEOC v. Johnson & Higgins*, 93 Civ. 5481, is currently proceeding in the United States District Court for the Southern District of New York.

not warrant his continuing as a Director . . . ". (Ja 21.) During the discovery phase of the district court litigation, petitioner continuously declined to make specific allegations of respondent's *alleged* performance deficiencies, and refused to produce any evidence demonstrating or even suggesting poor performance by respondent. (16a; 20a-26a.)

B. The Proceedings Below

On March 9, 1994, the district court granted summary judgment in favor of petitioner and respondent appealed (Ja 891; Ja 910.) On January 6, 1995, the court of appeals reversed the district court's summary judgment. (1a.) The court of appeals specifically held that summary judgment was inappropriate inasmuch as respondent had produced sufficient evidence of discriminatory intent and pretext to defeat summary judgment, and factual conflicts on the ultimate issue – i.e., whether respondent was discharged for poor performance or because of his age – had to be resolved by a jury. (19a).

SUMMARY OF THE ARGUMENT

The court of appeals did not hold, as petitioner contends, that an employee always survives summary judgment whenever the employee presents any evidence of pretext on a motion for summary judgment.

A. The court of appeals correctly held, consistent with the decision of this court in *Hicks*, that a plaintiff who has made out a *prima facie* case of discrimination

may defeat a motion for summary judgment and proceed to trial by producing either evidence of pretext or evidence of discrimination sufficient to permit the trier of fact to infer discrimination and find for the plaintiff.

B. The court of appeals' holding neither conflicts with the decisions of this Court nor other courts of appeals so as to present a justiciable issue requiring resolution by this Court.

C. Petitioner's dissatisfaction with the court of appeals' analysis of the evidence does not present a substantial issue appropriate for resolution by this Court.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS DID NOT HOLD, AS PETITIONER CONTENDS, THAT AN EMPLOYEE ALWAYS SURVIVES SUMMARY JUDGMENT WHENEVER THE EMPLOYEE PRESENTS ANY EVIDENCE OF PRETEXT ON A MOTION FOR SUMMARY JUDGMENT

Petitioner's petition is premised on its mischaracterization of the decision of the court of appeals. According to petitioner, the court of appeals (at 17a) held that "evidence sufficient to establish a prima facie case together with evidence that the employer's explanation is 'unpersuasive or even obviously contrived,' . . . *always entitles* a plaintiff to survive defendant's motion for summary judgment" (emphasis added). (Pet, p. 14.) Clearly, that was not the court of appeals' holding. To the contrary, the court of appeals merely held that in the case *sub judice*, respondent had produced sufficient evidence of discrimination and pretext from which discrimination could be

inferred, and extant genuine issues of material fact as to petitioner's discriminatory intent and pretext could not be resolved on summary judgment. (19a.) Accordingly, since petitioner was unable to meet its burden on summary judgment, the summary judgment entered in favor of petitioner by the district court was reversed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

A. The Court of Appeals Correctly Held, Consistent With The Decision Of This Court in *Hicks*, That A Plaintiff Who Has Made Out A *Prima Facie* Case Of Discrimination May Defeat A Motion For Summary Judgment And Proceed To Trial By Producing Either Evidence Of Pretext Or Evidence Of Discrimination Sufficient To Permit The Trier Of Fact To Infer Discrimination And Find For The Plaintiff

The court of appeals, in defining the applicable rule of law and relying upon this Court's decision in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), *did hold* that a plaintiff *may* defeat a motion for summary judgment and proceed to trial by producing either (a) evidence of pretext or (b) evidence of discriminatory intent *sufficient* to permit the trier of fact to infer discrimination and find for the plaintiff. (14a-15a). In reviewing the evidence of record in the case *sub judice*, the court of appeals correctly concluded that respondent had produced compelling evidence of both pretext (15a-17a) and discriminatory intent (17a-18a) *sufficient to defeat petitioner's motion for summary judgment and to proceed to trial.* (18a-19a.) Accordingly, the summary

judgment entered errantly in favor of petitioner by the district court was reversed. (19a.)

B. The Court Of Appeals' Holding Neither Conflicts With The Decisions Of This Court Nor Other Courts Of Appeal So As To Present A Justiciable Issue Requiring Resolution By This Court

It is misleading for petitioner to suggest that the court of appeals' decision is at odds with this Court's decision in *Hicks* so as to present a justiciable issue requiring resolution by this Court. On the contrary, the court of appeals paid careful attention to the principles espoused by this Court in *Hicks* (see 14a-15a, 19a.) and, as set forth *supra*, merely held – under those principles – that extant issues of material fact could not be resolved on summary judgment.

It is also misleading for petitioner to suggest that the court of appeals' decision in *this case* presents a justiciable conflict with other courts of appeals requiring resolution by this Court. Referring to decisions of the courts of appeals of the First and Fifth Circuits (Pet, pp. 14-15), petitioner contends that the First and Fifth Circuits – unlike the court of appeals below – have understood the language of *Hicks* and its progeny " . . . to mean only that the probative value of such evidence will *sometimes* be sufficient to permit a finding of discrimination depending upon the totality of the record". (original emphasis) (Pet, p. 14). However, *that* interpretation of *Hicks – embraced by petitioner in its Petition* – actually coincides with the ruling of the court of appeals in the case *sub judice*! Specifically,

and contrary to the mischaracterization of petitioner, the court of appeals held, citing *Hicks*, that:

> "Rejection of the employer's nondiscriminatory explanation does not compel a verdict in favor of the employee, but it *permits* the trier of fact to infer discrimination and find for the plaintiff on the basis of the allegations of discrimination in his prima facie case. 'The factfinder's disbelief of the reasons put forward by the [employer] . . . *may*, together with the elements of the [employee's] prima facie case, *suffice to show intentional discrimination*' ". (citations omitted) (emphasis added)

(14a-15a). The court of appeals, however, also noted that in the case *sub judice* that respondent had come forward with substantial evidence of discriminatory intent and pretext and the resultant presence of questions of material fact made this case inappropriate for disposition on a motion for summary judgment. (19a.) In short, petitioner had not met its burden on summary judgment.

Whether or not the evidence produced by respondent (along with that produced by petitioner) *will be* sufficient to permit a finding of discrimination is one, according to the court of appeals, which will be determined by the finder of fact. The court of appeals said nothing about what the finder of fact "had to do" at that stage of the proceedings. Thus, in concluding its analysis of the inappropriateness of the district court's grant of petitioner's summary judgment motion, the court of appeals stated:

> "Sempier's attack on J&H's stated reasons for his discharge leaves us with the paradigmatic

> case in which each party has produced testimony and evidence that conflicts on the ultimate issue - whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. Thus, the summary judgment entered in favor of J&H must be reversed." (footnote omitted)

(19a.)

Thus, the court of appeals' decision is in accord with both *Hicks* and *the decisions of other courts of appeals embraced by petitioner in its petition.*

C. Petitioner's Dissatisfaction With The Court Of Appeals' Analysis Of The Evidence Does Not Present A Substantial Issue Appropriate For Resolution By This Court

While the petition *attempts* to portray the court of appeals' decision as being in conflict with the decisions of this Court and other courts of appeals in an effort to manufacture an issue of "substantial importance" requiring resolution by the Court, the petition essentially does no more than quarrels with the inferences drawn by the court of appeals from the factual record and the court of appeals' resultant conclusion that summary judgment was improper in this case. See, e.g., the lengthy discussion at footnote 6 of the petition wherein petitioner incorrectly argues that the court of appeals should have drawn inferences from the evidence in favor of petitioner, the moving party on the summary judgment motion, rather than in favor of respondent, the opposing party. Compare Pet, pp. 19-20, fn. 6 with the court of appeals' correct

handling of the evidence at 6a-9a and 15a-19a. Petitioner's criticism of the court of appeals' conclusion that summary judgment was inappropriate ignores the principles espoused by this Court in *Celotex* and *Anderson*.

Similarly, petitioner errantly attacks the court of appeals' handling of the evidence of pretext by arguing that the court of appeals "misconstrued" petitioner's explanation for terminating respondent's employment. Incredibly, petitioner argues that the court of appeals did not "fairly characterize" petitioner's position (that it terminated respondent's employment because of respondent's *allegedly* poor work performance). (Pet, p. 10.) See, however, Ja 21; Ja 261; Ja 305-6; Ja 718. While petitioner seeks to ignore – indeed erase – the fact that it unfairly and wrongfully attacked the reputation of a man with an exemplary work record in its effort to bring about his involuntary retirement, the court of appeals did not. Rather, the court of appeals focused on the *evidence* and correctly concluded:

> "Where, as here, Sempier asserts not only that he performed well but that he never received any unfair criticism that his performance was poor or inadequate, the jury could conclude that J&H's failure to fault Sempier's performance for the 20 years prior to the negotiations leading to his discharge makes suspect its *post hoc* assertions of poor performance. This is especially true when J&H has failed to produce any other evidence of poor performance or make specific allegations of Sempier's deficiencies".

(16a.)

Petitioner's baseless dissatisfaction with the court of appeals' examination of the record and conclusions hardly presents a substantial issue requiring resolution by this Court.[4]

CONCLUSION

Respondent prays that this Court deny petitioner's petition for a writ of certiorari because the court of appeals' holding was not in error, and the case *sub judice* does not present a substantial issue appropriate for this Court's review.

Respectfully submitted,

CHARLES F. WASKEVICH, JR.
Counsel of Record
RIKER, DANZIG, SCHERER,
HYLAND & PERRETTI
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Attorneys for Respondent

[4] The court of appeals' reversal of the district court's grant of summary judgment is particularly appropriate in view of the court of appeals' additional finding and conclusion that petitioner had wrongfully refused to respond to respondent's discovery requests seeking, *inter alia*, evidence of both pretext and discriminatory intent. (See 19a-28a and, in particular, fn. 9 at 21a.) For that reason *alone*, the district court's grant of summary judgment to petitioner was improper. For that reason *alone*, the petition should also be denied.

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHNSON & HIGGINS,

Petitioner,

vs.

BURT N. SEMPIER,

Respondent.

PETITIONER'S REPLY BRIEF

JOHN F. CANNON
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

ROBIN D. FESSEL
SULLIVAN & CROMWELL
New York, New York

FRANCIS X. DEE
DAVID J. REILLY
CARPENTER, BENNETT & MORRISSEY
Newark, New Jersey

Of Counsel

June 15, 1995

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TABLE OF CONTENTS

Page

I THE COURT OF APPEALS' HOLDING IS CORRECTLY STATED IN THE PETITION AND REFLECTS A CONFLICT AMONG THE COURTS OF APPEALS AND WITH THIS COURT'S DECISION IN HICKS 1

II RESPONDENT'S ASSERTIONS CONCERNING THE RECORD ARE IRRELEVANT AND INACCURATE, BUT INSTRUCTIVE 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Page

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) . . . . . passim

St. Mary's Honor Center v. *Hicks*, ___ U.S. ___, 113 S. Ct. 2742 (1993) . . . . . passim

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 2, 3

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PETITIONER'S REPLY BRIEF

I

THE COURT OF APPEALS' HOLDING IS CORRECTLY STATED IN THE PETITION AND REFLECTS A CONFLICT AMONG THE COURTS OF APPEALS AND WITH THIS COURT'S DECISION IN HICKS

Respondent does not challenge J&H's analysis of the division among the courts of appeals regarding how *St. Mary's Honor Center* v. *Hicks*, ___ U.S. ___, 113 S. Ct.

2742 (1993), is to be interpreted in the summary judgment context (Pet. 14-16). Rather, he attempts to obfuscate with regard to what the court of appeals explicitly held here. (*Compare id.*, 8-12 *with* Br. Opp. 12-17.) But the question J&H asks the Court to review is directly presented by the court of appeals' own "recap" of its decision:

> [O]nce Sempier had made out a prima facie case of age discrimination, a presumption arose that J & H had discriminated against him. *Burdine*, 450 U.S. at 254. J & H dispelled that presumption by coming forward with a nondiscriminatory reason for Sempier's discharge, leaving nothing but the permissible inference of discrimination created by the prima facie case. *Hicks*, ___ U.S. at ___; 113 S. Ct. at 2748-49. Sempier's attack on J&H's stated reasons for his discharge leaves us with the paradigmatic case in which each party has produced testimony and evidence that conflicts on the ultimate issue -- whether Sempier was discharged for poor performance or because of his age. The resulting conflict must be resolved by a jury and cannot be resolved on summary judgment. (Pet. 18a-19a (emphasis added).)

The court of appeals could not have been clearer that the prima facie case which it found Mr. Sempier had made out (*id.*, 8-10) -- a finding which, tellingly, Mr. Sempier spends no time defending -- gave rise to a "permissible inference of discrimination" that a jury would be free to draw, without regard to what *all* the evidence bearing upon discriminatory intent might justify, if it found Mr. Sempier's "attack on J&H's stated business reasons" plausible. That view of the law is consistent with the holdings of at least the Fourth, Sixth, Eighth and Ninth Circuits, but in conflict with the First and Fifth Circuits and, we respectfully submit, *Hicks* as

well (*id.*, 14-16). A resolution of that conflict is of first importance to federal discrimination law (*id.*, 17-21).

II

RESPONDENT'S ASSERTIONS CONCERNING THE RECORD ARE IRRELEVANT AND INACCURATE, BUT INSTRUCTIVE

Because the Petition asks this Court to consider whether or not the court of appeals applied the proper legal standard in reviewing the summary-judgment record before it, it is not necessary here to correct any of Mr. Sempier's assertions as to what the admissible evidence in that record is competent to establish. (See Pet. 10 n.4, 11 n.5, 19 n.6.) However, J&H believes that the following three comments on Mr. Sempier's Statement of the Case will serve to illustrate the thin gruel a discrimination plaintiff is encouraged to rely upon by the formulaic use in the summary-judgment context of a prima facie case finding under the *McDonnell Douglas* framework, after that framework is supposed to have "drop[ped] from the case." *Burdine*, 450 U.S., at 255, and "is no longer relevant," *Hicks*, 113 S. Ct., at 2749.

A.

A little over a page is devoted to the alleged "Coercive Retirement Program" which J&H's then CEO, Mr. Hatcher, initiated in May 1989 (Br. Opp. at 3-4). Everything said represents counsel's "interpretation" of six J&H documents (JA636-642). The last document in the sequence is a copy of the minutes of the Personnel and Compensation ("P&C") Committee on December 5, 1989 (JA 642), which stated in pertinent part:

> Dick Nielsen [an Executive Vice President and Director] reviewed with the Committee the status of what has been the corporate plan for early retirements. From the original 85 candidates that were

> put on the list in response to Mr. Hatcher's memorandum last summer, 7 additional people have been added. Of the 92 people in total, the following is a breakdown of their current status: 13 retired or will be retiring; 4 resigned; 4 were terminated; 50 were removed from the list for various reasons; 21 still on the list (13 for poor performance and 8 for being redundant). The Legal Department will be consulted with regarding the next step with this project.

As a member of the P&C Committee -- indeed, the Personnel Department reported to him at the time (Pet. 4-6) -- Mr. Sempier was in the middle of these events. On his deposition he testified that he believed that the original list of people produced in response to Mr. Hatcher's memorandum included some who had been put on because of their age. Asked why he thought so, Mr. Sempier answered, "I was led to understand that some people misunderstood some of what Hatcher was asking for, and advanced names simply because they were at or near retirement" (JA 454, lines 4-7). Asked the same question about the 42 who remained after the 50 were removed from the list for various reasons, Mr. Sempier said, "I can't say because I don't know who the 42 were. I don't recall who the 42 were." (*Id.* lines 24-25.) Similarly, as to the 13 who retired, Mr. Sempier did not know how they came to retire (JA 456, lines 20-21), nor did he have any information about the four who resigned or the four who were terminated (JA 457, lines 10-13). He could not identify a single individual, other than himself, whom he believed was a victim of age discrimination, and he testified that he had no reason to believe J&H had done anything wrong under the Program. (JA 458-60.) The only basis for Mr. Sempier's alleged belief that *he* was mistreated because of his age was that, allegedly, no "real reasons" were "offered up" to him before his resignation was accepted on June 11, 1991 (JA 425-33).

B.

The assertion that no "real reasons" for the Board's unanimous acceptance of Mr. Sempier's resignation were "offered up" is continued in this Court:

> . . . respondent was never informed of any cause or reason for the termination of his directorship and employment with petitioner, particularly any reason involving his performance . . . (Br. Opp. at 11.)

(See also *id.*, 2 and Pet. 4-6, 19 n.6.) However, the record shows, among other things, that two months before his resignation was accepted, J&H's counsel wrote to Mr. Sempier's counsel as follows (JA 277):

> What this matter is about is that, for some time now, Mr. Sempier has not had enough to do, even nominally, to justify his continuing as a Director of J&H. In the five years since he was elected a Director, Mr. Sempier has failed effectively to perform any of the major responsibilities that were assigned to him; one after another his finance, administration, and management-information functions have had to be taken away and assigned to others, and he has become the lowest paid of J&H's 37 Directors. The longer he is left in place the greater the risk of injury to the credibility of the Directors as leaders of the firm, to the morale of hard-working subordinates who are aware of the facts, and in J&H's judgment, to Mr. Sempier himself. Mr. Olsen and the other senior managers of J&H believe therefore that, if requested, considerably more than two-thirds of the Directors would authorize Mr. Olsen to accept the letter of resignation Mr. Sempier signed when he first became a Director.

C.

The bulk of Mr. Sempier's Statement of the Case is devoted to alleged events subsequent to April 19, 1990, the day Mr. Hatcher told him in no uncertain terms that he would have to leave J&H (Br. Opp. at 5-10). The inference that the reader is obviously supposed to draw is that because from April 1990 until June 1991 J&H was trying to get him to *retire*, its motives must have been age-based. However, Mr. Hatcher testified, without contradiction, that "A Director who is 55 years of age or older at the time he leaves J&H, regardless of reason, is treated as a retiree under J&H's Plans" (JA 369). Mr. Sempier was 58 years old in April 1990 (JA 492).

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration.

Respectfully submitted,

John F. Cannon
Counsel of Record for Petitioner
125 Broad Street
New York, New York 10004
(212) 558-4000

Robin D. Fessel
Sullivan & Cromwell
New York, New York

Francis X. Dee
David J. Reilly
Carpenter, Bennett & Morrissey
Newark, New Jersey

Of Counsel

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